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ABSTRACT

This document presents the transcripts of the Congressional hearing on the protection of children against sexual exploitation. Opening statements from Subcommittee Chairman William J. Hughes and from Representative Lawrence J. Smith are presented. Testimony and prepared statements from seven witnesses are provided, including Congressional representatives from Florida and California; the chief counsel and an assistant commissioner of the U.S. Customs Service; a manager from the Fraud and Prohibited Mailings branch, and the assistant chief postal inspector for Criminal Investigation, U.S. Postal Service; and the Deputy Assistant Attorney General of the Criminal Division, U.S. Department of Justice. Additional material includes a study of the social/sexual abuse of children from the Washington School of Psychiatry; a letter from William F. Bolger, Postmaster General, concerning procedures for examination and opening of mail; a memorandum on federal child pornography legislation and hearings; and a statement from the American Family Assocation. (KGB)

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PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3062 and Related Bills

PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION

JUNE 16, 1983

Serial No. 138

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PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION

THURSDAY, JUNE 16, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:45 a.m., in room B-352, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes, Smith, Sawyer, Shaw, and Sensenbrenner.

Staff present: Hayden W. Gregory, chief counsel; Eric E. Sterling, assistant counsel; Charlene Vanlier, associate counsel, and Phyllis N. Henderson, clerk.

Mr. HUGHES. The Subcommittee on Crime will come to order.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photography, or by other similar methods.

In accordance with Committee Rule 5(a), permission is granted, unless there is objection. I am not sure anybody is here to object, Earl. Such coverage will be permitted.

Good morning. The hearing that we are having this morning is one I would prefer not to have to hold. Crime is never a pretty subject, but we encounter few crimes as ugly as that which we are looking at today—sexual abuse of children.

Six years ago, Congress enacted legislation to combat one particular form of sexual child abuse. This was the disgusting, and increasing, practice of sexual exploitation of children by inducing them to engage in sex acts, frequently with adults, in order to photograph and film them and to distribute these pornographic products to persons interested in viewing these perversities. Testimony before the Subcommittee on Crime at that time indicated that thousands of children were being abused in this particular fashion.

We learned that these child abusers produce their own magazines and newsletters devoted to these practices. They exchange photos, films, publications, and sometimes, exchange the children themselves.

They develop their own trade lingo under which young boys are known as "chickens", and the depraved men who prey upon them are "chicken hawks".

We even heard about individual groups who claimed that explicit sex by children, including very young children, is healthy, if not essential to their development.

One group on the letterhead of its stationery, apparently in complete seriousness, depicted a child undressing with the slogan "Sex before eight"—meaning years old—"or it's too late"—meaning for proper development, I presume.

This argument, like the photographic materials which depict children in explicit sex acts, is absolute rubbish.

I agree with the observation of news commentator Bill Moyers, who stated in a recent editorial:

"Once I even heard child pornography referred to as a 'victimless' crime. That's nonsense. There are, by one account, over a half million children in this country used in sex-for-sale activities. Some films have been made with children under four. No victims?"

The purpose of our hearing today is to get a progress report on the effectiveness of the 1977 law in facilitating prosecution of these child abusers and in drying up the supply of the child pornography materials they produce.

We will also be taking testimony aimed at identifying the nature of the child pornography "industry" and developing a profile of the typical child at risk of such exploitation .

Finally, and most importantly, we will be looking at proposals to strengthen the law already on the books. It is encouraging to learn that there have been several dozen successful prosecutions under this law for distribution of child pornography materials.

At the same time, I was very disappointed to learn that there has not been a single conviction under the principal provision of the 1977 law, which is aimed at the persons directly abusing children by posing them for such films and photographs. We want to learn why we have been unable to reach the principal perpetrators of sexual child abuse.

We want to make the Federal law more effective in stopping sexual child abuse and the proliferation of materials depicting that abuse.

The U.S. Supreme Court last year cleared the way for broader and more effective use of laws of this nature when it held that child pornography materials are not entitled to constitutional protection under the First Amendment.

As a result of that decision, one of the changes in the law we will be looking at would permit the prosecution of persons distributing such materials without proving that the materials are legally obscene.

[Copies of H.R. 2106, H.R. 2151, H.R. 2432, H.R. 3062, and H.R. 3298 follow:]

I

98TH CONGRESS
1ST SESSION

H. R. 2106

To strengthen law enforcement in the areas of child exploitation and pornography, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 1983

Mr. PASHAYAN (for himself, Mr. ALBOSTA, Mr. BEVILL, Mr. BLILEY, Mr. BROWN of California, Mr. DANNEMEYER, Mr. DREIER of California, Mr. GINGRICH, Mr. GOODLING, Mr. HANSEN of Utah, Mr. HERTEL of Michigan, Mr. JEFFORDS, Mr. KASICH, Mr. KINDNESS, Mr. LAGOMARSINO, Mr. LIVINGSTON, Mr. MCGRATH, Mr. NIELSON of Utah, Mr. ORTIZ, Mr. PORTER, Mr. PRITCHARD, Mr. ROEMER, Mr. SCHEUER, Mr. SMITH of New Jersey, Mr. SUNIA, and Mr. WORTLEY) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To strengthen law enforcement in the areas of child exploitation and pornography, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

This Act may be cited as the "Child Protection Act of 1983".

SEC. 2. (a) Section 2252 of title 18, United States Code, is amended—

(1) in subsection (a)(1) by striking out ", for the purpose of sale or distribution for sale, any obscene" and inserting in lieu thereof "any"; and

(2) in subsection (a)(2) by striking out "for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene" and inserting in lieu thereof ", sells, or distributes any".

(b) Section 2253(3) of title 18, United States Code, is amended by striking out ", for pecuniary profit".

98TH CONGRESS
1ST SESSION

H. R. 2151

Entitled the "Comprehensive Crime Control Act of 1983".

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 1983

Mr. FISH (for himself, Mr. MOORHEAD, Mr. HYDE, Mr. KINDNESS, Mr. LUNGREN, Mr. SENSENBRENNER, Mr. MCCOLLUM, Mr. SHAW, Mr. GEKAS, and Mr. DEWINE) (by request) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

Entitled the "Comprehensive Crime Control Act of 1983".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Crime Control Act of 1983".

TITLE I—BAIL

SEC. 101. This title may be cited as the "Bail Reform Act of 1983".

SEC. 102. (a) Sections 3141 through 3151 of title 18, United States Code, are repealed and the following new sections are inserted in lieu thereof:

seq.) and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.); and

"(7) the term 'serious bodily injury' means bodily injury to a person which involves—

"(A) a substantial risk of death;

"(B) extreme physical pain;

"(C) protracted and obvious disfigurement; or

"(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

The table of sections at the beginning of chapter 65 of title 18 of the United States Code is amended by adding at the end the following new item:

"1365. Tampering with consumer products with intent to cause injury or death.".

PART B—CHILD PORNOGRAPHY

SEC. 1502. (a) Section 2252 of title 18, United States Code, is amended—

(1) in subsection (a)(1) by striking out ", for the purpose of sale or distribution for sale, any obscene" and inserting in lieu thereof "any";

(2) in subsection (a)(1)(B) by striking out "such visual or print medium depicts such conduct; or" and inserting in lieu thereof "such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct; or";

(3) in subsection (a)(2) by striking out "for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene" and inserting in lieu thereof ", sells, or distributes any"; and

(4) in subsection (a)(2)(B) by striking out "such visual or print medium depicts such conduct;" and inserting in lieu thereof "such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct;".

(b) Section 2253(3) of title 18, United States Code, is amended by striking out ", for pecuniary proft".

PART C—WARNING THE SUBJECT OF A SEARCH

SEC. 1503. Section 2232 of title 18 of the United States Code is amended by adding a new paragraph as follows:

"Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined not more than $10,000 or imprisoned not more than five years, or both.".

98TH CONGRESS
1ST SESSION

H. R. 2432

To amend title 18 of the United States Code relating to the sexual exploitation of children.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1983

Mr. HUTTO introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 18 of the United States Code relating to the sexual exploitation of children.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sexual Exploitation of Children Act of 1983".

SEC. 2. The Congress hereby finds that—

(1) child pornography has developed into a highly organized, multimillion-dollar industry which operates on a nationwide scale;

(2) thousands of children including large numbers of runaway and homeless youth are exploited in the

production and distribution of pornographic materials; and

(3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

SEC. 3. Chapter 110 of title 18, United States Code, is amended to read as follows:

"CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

"Sec. 2251. Definitions for chapter.
"Sec. 2252. Sexual exploitation of children.
"Sec. 2253. Certain activities relating to material involving the sexual exploitation of minors.
"Sec. 2254. Defense.

"§ 2251. Definitions for chapter

"For the purposes of this chapter, the term—

"(1) 'minor' means any person under the age of eighteen years;

"(2) 'sexually explicit conduct' means actual or simulated—

"(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(B) bestiality;

"(C) sado-masochistic abuse (for the purpose of sexual stimulation);

"(D) masturbation; or

"(E) lewd exhibition of the genitals or pubic area of any person;

"(3) 'simulated' means the explicit depiction of any conduct described in clause (2) of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks;

"(4) 'producing' means producing, directing, manufacturing, issuing, publishing, or advertising; and

"(5) 'visual or print medium' means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

"§ 2252. Sexual exploitation of children

"(a) Any person who knowingly employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(c) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both.

"§ 2253. Certain activities relating to material involving the sexual exploitation of minors

"(a) Any person who—

"(1) knowingly transports or ships in interstate or foreign commerce or mails any visual or print medium, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium depicts such conduct; or

"(2) knowingly receives any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium depicts such conduct;

shall be punished as provided in subsection (b) of this section.

"(b) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than 15 years, or both.

"§ 2254. Defense

"In any prosecution brought under this chapter for the production or distribution of a visual or print medium depicting sexually explicit conduct as defined in section 2251(l)(2)(D) or (E), it shall be an affirmative defense that the medium,

when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value.".

SEC. 4. Section 1961 of title 18, United States Code, is amended in clause (1)(B) by inserting after "section 1955 (relating to the prohibition of illegal gambling businesses)," the following: "sections 2252 and 2253 (relating to the sexual exploitation of children),".

SEC. 5. Section 1964 of title 18, United States Code, is amended in subsection (c) by striking out "his business or" and inserting in lieu thereof "his person, business, or".

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98TH CONGRESS
1ST SESSION

H. R. 3062

To amend title 18 of the United States Code relating to the sexual exploitation of children.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 1983

Mr. SAWYER (for himself, Mr. MARLENEE, Mr. FISH, Mr. SENSENBRENNER, and Mr. SHAW) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 18 of the United States Code relating to the sexual exploitation of children.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

This Act may be cited as the "Federal Anti-Child Pornography Act of 1983".

SEC. 2. (a) Section 2251(c) of title 18, United States Code, is amended by striking out "$10,000", and by inserting in lieu thereof "$100,000", and by striking out "$15,000", and by inserting in lieu thereof "$200,000".

(b) Section 2252 of title 18, United States Code, is amended—

(1) in subsection (a)(1) by striking out ", for the purpose of sale or distribution for sale, any obscene" and inserting in lieu thereof "any";

(2) in subsection (a)(1)(B) by striking out "such visual or print medium depicts such conduct; or" and inserting in lieu thereof "such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conducts; or";

(3) in subsection (a)(2) by striking out "for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene" and inserting in lieu thereof ", sells, or distributes any";

(4) in subsection (a)(2)(B) by striking out "such visual or print medium depicts such conduct;" and inserting in lieu thereof "such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct;"; and

(5) in subsection (b) by striking out "$10,000", and inserting in lieu thereof "$100,000", and by striking out "$15,000", and inserting in lieu thereof "$200,000".

(c) Section 2253 of title 18, United States Code, is amended—

(1) in subsection (2) by inserting "But does not include simulation in a visual medium which, when taken as a whole, has serious literary, artistic, political, scientific, or educational value." following subsection (E); and

(2) in subsection (3) by striking out ", for pecuniary profit".

(d) Subsection (1) of section 2516 of title 18 of the United States Code is amended in paragraph (c) by adding "sections 2251 or 2252 (sexual exploitation of children)," after "section 664 (embezzlement from pension and welfare funds),".

98TH CONGRESS
1ST SESSION

H. R. 3298

To amend chapter 110 (relating to sexual exploitation of children), and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 14, 1983

Mr. HUGHES (for himself and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 110 (relating to sexual exploitation of children), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Child Protection Act of 1983".

SEC. 2. Section 2251 of title 18 of the United States Code is amended—

(1) by striking out "visual or print medium" each place it appears and inserting "visual depiction" in lieu thereof;

(2) by striking out "depicting" each place it appears and inserting "of" in lieu thereof;

(3) by striking out "$10,000" and inserting "$100,000" in lieu thereof; and

(4) by striking out "$15,000" and inserting "$200,000" in lieu thereof.

SEC. 3. Section 2252 of title 18 of the United States Code is amended—

(1) by striking out "for the purpose of sale or distribution for sale" each place it appears;

(2) by striking out "obscene" each place it appears;

(3) by striking out "visual or print medium" each place it appears and inserting "visual depiction" in lieu thereof;

(4) by striking out "depicts" each place it appears and inserting "is of" in lieu thereof;

(5) by striking out "for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale" and inserting in lieu thereof "or distributes";

(6) by inserting after "mailed" the following: "or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails";

(7) by striking out "$10,000" and inserting "$100,000" in lieu thereof; and

(8) by striking out "$15,000" and inserting "$150,000" in lieu thereof.

SEC. 4. Section 2253 of title 18 of the United States Code is amended—

(1) by inserting after "actual or" the following: ", to the extent the possibility of harm to the minor, taking into account the nature and circumstances of the simulation, is not outweighed by redeeming social, literary, scientific, or artistic, value,";

(2) by inserting "and" at the end of paragraph (2);

(3) by striking out "; and" and the end of paragraph (3) and inserting a period in lieu thereof; and

(4) by striking out paragraph (4).

Mr. HUGHES. Does the gentleman from Florida have an opening statement?

Mr. SMITH. Thank you, Mr. Chairman.

I would certainly want to echo the sentiments that you have just expressed, and also to say that for those of us that have served in State legislatures over the years, we have found this to be a consuming problem and one that has obviously been growing. Apparently the problem has been there for many years. But it is only in recent years that it has surfaced to the point where, both at the State and Federal levels, there is now a concerted movement forward.

I am interested, as you are, in determining how effective the Federal law has been and how much better it can be made in order to prosecute these types of crimes.

My State, in particular—I see my colleague and good friend Congressman Hutto here today and I am very happy that he is here to be involved in this important issue.

My State, unfortunately, has been one of those areas which has been, like in many other unfortunate areas, in the forefront of the problems created by child pornography.

We are grateful for the hearing today in the hopes that we can gain from this experience and the overview that will be taking place, and any changes that may come out of it—further experience in order to go back to the State and work on that level as well.

So I am very grateful to you, as usual, for something that needs to be examined, and is, in fact, being examined.

Thank you.

Mr. HUGHES. As has been indicated, our first witness this morning is our most distinguished colleague from the First District of Florida, Earl Hutto. Earl is presently serving his third term in the Congress. He has served on the Armed Services Committee, and it has been my privilege to serve with him on the Merchant Marine and Fisheries Committee where he is one of our most outstanding members.

His work on behalf of the welfare of children has been long standing and also distinguished.

In the Florida House of Representatives, he was the chairman of the subcommittee on post-secondary education, and has been very active on behalf of retarded children and in the activities of the Boy Scouts of America.

Earl is the author of H.R. 2432, a bill to amend title 18 of the United States Code relating to the sexual exploitation of children.

Earl, we are just delighted to have you with us and we want to commend you for your leadership in this area. We have a copy of your statement which, without objection, will be made a part of the record in full. And you may proceed as you see fit.

TESTIMONY OF HON. EARL HUTTO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. HUTTO. Thank you very much, Mr. Chairman. I appreciate your kind words and also the opportunity to appear before you and your distinguished members of the subcommittee.

Let me commend you for scheduling this hearing and for recognizing the present problem that exists in regard to child pornography laws.

In April, I introduced the Sexual Exploitation of Children Act of 1983. This bill, which is the equivalent House version of Senator Arlen Specter's original bill, S. 57, addresses major deficiencies in the present law that you have alluded to, as well as it incorporates the Supreme Court's *Ferber* case of last summer.

Without going into all of the provisions of my bill and reiterating the need of these changes, allow me just to address a few of the points that I feel are crucial in any discussion pertaining to the child pornography issue.

First, the sexual exploitation of children is a human rights issue. Throughout the world, our Nation stands as the vanguard for human rights, but yet when it comes to our own children, who are helpless in our streets, we become preoccupied with legal questions and lose sight of the real issue. The protection of our children must be a priority.

With thousands, some of them as young as 1 year old, or less, being victimized each year, Congress has a responsibility to respond swiftly and harshly to these human rights violations involving children. As a human rights issue, it is a national disgrace to do anything less than what we are attempting to do.

Second, the courts have determined on numerous occasions that children warrant special protection under the law. Due to their vulnerability and inability to protect themselves, either mentally or physically, legal exceptions should be made to secure their rights and privileges.

Child pornography is a form of child abuse and deserves special recognition and penalties in the law.

Finally, because of the *New York* v. *Ferber* case, Congress can act on this issue with constitutionality tested legal precedent in the law. First amendment questions regarding obscenity have been resolved by the Court in the *Ferber* decision which you mentioned earlier.

Therefore, I would hope, Mr. Chairman, that your subcommittee will adopt this decision and attempt to formulate a law which needs little or no further constitutional clarification.

We all recognize our Nation's children as a national treasure. However, with each day that passes, more and more of our children are abused and exploited. Today, we have within our grasp the ability to put an end to this national disgrace.

With over 110 Members of the House cosponsoring my bill there is a sizable resolve in the House regarding this issue and I have been impressed by the wide, philosophical range of those who have cosponsored, from the most liberal to the most conservative. Members of the House are incensed as well as the American people over what is happening to our children.

I know in my discussions with you that you are very concerned about this—you are more than concerned, you are very serious—about this question. I call upon you and the members of your committee, and I express my cooperation in any way possible so that we can place child pornography as a top priority.

So as you develop this legislation, I look forward to working with you and, again, my sincere appreciation for your holding this hearing. I would be happy to try to answer any questions you or other members may have.

Mr. HUGHES. Thank you very much for a very good and helpful statement.

Let me ask you, Earl, how should we define the term "minor"? This is one of the questions that arises.

Mr. HUTTO. Mr. Chairman, in my bill, as you know, I have put the age up to 18, because 18 is the legal voting age and many States have passed age of majority laws which place the age of majority at 18 or above. So I felt that we ought to move to this age which I feel is the legal one for majority, and include those 18 and under.

Mr. HUGHES. Yes; H.R. 2432 does use the definition of a minor being a person under the age of 18.

Mr. HUTTO. Yes, sir.

Mr. HUGHES. In your legislation, you permit an affirmative defense for certain acts which, when taken as a whole, show that the material serves some literary, artistic, scientific, or educational purpose.

Do you feel that defense, perhaps, may undercut the broad sweep of the *Ferber* decision which, in effect, says that this type of material is not protected by the first amendment?

An affirmative defense, I think, possibly would interject the whole question of first amendment rights back into the issue.

Mr. HUTTO. Mr. Chairman, my opinion is that one reason that we haven't had convictions is that we are caught up in all this legalese, and I think the burden should be placed on the defense to prove that it is not obscene. And in accordance with the *Ferber* decision—and I admit to you, not being a lawyer, that I don't know all of the ins and outs of that—but I think the *Ferber* decision would be one which we could act on in putting into law some kind of a measure that will have teeth in it, and would not allow too many outs, you know. And would provide for a clampdown and some convictions. From all reports that I have seen—and I know you are familiar with the magazine article that came out on this issue, and with the work that is being done in New York City and other places, to try to get some teeth into the law so that some convictions can be had to try to get to the real issue and to deter the problem of child pornography .

I think we get caught up in legalisms too much and that is one of our problems. So I think the burden should be placed on the defense.

Mr. HUGHES. I would assume, just from what you have said, that if it is not necessary to provide any affirmative defense for the defendant and still comport with the first amendment and other constitutional rights, you would prefer to do that.

In other words, if we could maximize application of the holding of the *Ferber* decision and deny the availability of a defense that the material is not obscene under the standards for determining obscenity, you would support that approach.

I would invite you to examine a couple other bills that have been introduced. One by Hal Sawyer of Michigan, our ranking Republi-

can. We will also hear testimony on H.R. 3298, which I have introduced, which does not permit any affirmative defense.

Mr. HUTTO. I would hope that you would seriously consider having affirmative defense in the bill. It is just my own belief as a layman. I feel that we would have much better success with it if we do that and put the burden where it ought to be.

I realize that in your law training and we have a lot of lawyers, but the person on the street and the average person doesn't understand all of that—they can't understand people getting away with some of the heinous activities that we have had in our Nation.

We, of course, want to provide the proper rights to people, but I think we have to get tough with crime. I know that you, and in my discussions with you, are interested in doing that.

I would think that that would be one provision that I would like to see incorporated into the bill.

Mr. HUGHES. I see. OK.

The gentleman from Florida.

Mr. SMITH. Thank you, Mr. Chairman.

I also want to commend the gentleman for—if you are not a lawyer, maybe you should have been one, Earl—commend him for his extreme interest and concern in this problem which is obviously of concern to many people and needs to be examined.

I am kind of in the same vein as the chairman—a little bit concerned about the fact that when you transfer the burden to the defendant to prove that something was in fact not obscene, what you are doing in essence is, to some degree, going and taking the constitutional prohibition against prior restraint, or to some degree even free speech, or free exhibition of materials.

In a way, through a veil almost, reaching that constitutional safeguard—and I am a little nervous about it as an attorney. Like you, as a citizen, it wouldn't bother me. But as an attorney it bothers me to get into a situation where one might wind up attacking the constitutionality of the statute based upon the fact that there was a transfer of that defense and, therefore, possibly, an unconstitutional challenge made automatically by virtue of the fact that there is prior restraint.

Something in that sense, then, and that would be on its face entitled to be said as protected by free speech would not be, and you would have to come in and prove that it was, which is not the way it works now.

So I would be interested in pursuing that further but beyond that, I agree.

I do have a question, though, and you mentioned, or the chairman did, this bill is either very similar or the same as Senator Specter's bill. But in the affirmative defense provision, Senator Specter's bill provides an exception for masturbation on the grounds that that is less offensive—I don't know who is using the yardstick of offensive—but in the affirmative defense, a child's induced conduct is masturbation or nudity, these are less patently offensive than sexual intercourse, beastiality, et cetera, et cetera, et cetera.

And the second one is that the film, book, or what have you, has serious literary, artistic, or other merit.

That is not in your bill. What was that a conscious removal of that section?

Mr. HUTTO. Mr. Smith, Senator Specter has reintroduced a bill and I can't say that I am really familiar with his new bill. I don't know what all the provisions are.

Mr. SMITH. I think he eliminated the——

Mr. HUGHES. Would the gentleman yield?

Mr. SMITH. Certainly.

Mr. HUGHES. I think affirmative defense was eliminated. I think the term "simulation" was redefined, and some other changes were made.

Mr. SMITH. Those are the only questions I have. I mean I would love to ask a million questions, but the reality is that very few people are going to disagree on this. The question is whether the approach can be sustained. That is the only question. We would hate to put something in the law and have it challenged and have to go back and redo it. You know, a lot of us are very sensitive to that, Earl.

Mr. HUTTO. I understand that. I understand that perfectly. But I am really grateful that there is a serious intent, I think, on the part of your committee to do something about it. I just want to work with you in any way that I possibly can. I know that you have to be realistic about what you think will hold up.

I think because of the *Ferber* decision we have a moral attitude. I would just ask, Mr. Chairman, that you would keep on your citizen's hat, Mr. Smith and all of you, in dealing with this question because it is obvious that the 1977 law has not been effective.

I think we all want something that will be effective. I look forward to working with you in any way that I possibly can.

Mr. HUGHES. Thank you.

I think we all want to do the same thing.

Mr. HUTTO. Absolutely.

Mr. HUGHES. We want to craft a bill that is going to reach this ugly material——

Mr. HUTTO. Yes.

Mr. HUGHES [continuing]. As I indicated in my opening statement. We want to keep it as simple and as direct but as effective as we can in reaching these smut peddlers. So I think we all want to do the same thing.

Mr. SMITH. Will the gentleman yield?

Mr. HUGHES. Be happy to.

Mr. SMITH. Thank you, Mr. Chairman.

I am also interested in doing this for another reason. We have had, as you know, a proliferation of magazines, a number of magazines, which legitimate stores are beginning to carry as well. In Florida we passed a law that if you carry this type of what was otherwise not standard fare, you had to put it behind the counter and you had to put a cover over it and it couldn't be available to young people, and so on.

There has been a proliferation now in almost what you would consider like convenience stores, 7-Elevens, just as an example, of these kinds of materials. It pains me that they would think that there is enough of a market out there that a legitimate, good business enterprise, otherwise a very solid business, would be in the sit-

uation where they have even tangentially, even to some degree, these kinds of materials.

If we pass something that mak[illegible] it very clear that these materials are not appropriate under any circumstances, we will rid them from places where they will not be available readily. I think that is one of the reasons, too. It is not just the black market anymore. This stuff is beginning to proliferate into what is otherwise the open kind of market. That is a very dangerous thing to have to happen.

So I am happy that if we address this then we will be getting an approach where people will get a clear message that this is not to be available under any circumstances even in the best of intention kinds of retail establishments.

Mr. HUGHES. Again, thank you. We appreciate your contributions and commend you for your leadership. You and Chip Pashayan, who is our next witness, have been very helpful to the subcommittee.

Mr. HUTTO. Thank you very much. Thank you, Mr. Chairman.

[The statement of Mr. Hutto follows:]

STATEMENT BY CONGRESSMAN EARL HUTTO

Thank you, Mr. Chairman, I appreciate this opportunity to appear before you and the other distinquished members of this subcommittee. Let me first commend you for scheduling this hearing and for recognizing the present problem that exists in regards to child pornography laws.

In April, I introduced the Sexual Exploitation of Children Act of 1983. This bill, which is the equivalent House version of Senator Arlen Specter's original bill, S. 57, addresses major deficiencies in present law as well as incorporates the Supreme Court's Ferber case of last summer. Without going into all the provisions of my bill and reiterating the need for these changes, allow me to address a few of the points that I feel are crucial in any discussion pertaining to the child pornography issue.

First, the sexual exploitation of children is a human rights issue. Throughout the world, our nation stands as the vanguard for human rights, but yet when it comes to our children who are helpless in our streets, we become preoccupied with legal questions and lose sight of the real issue. The protection of our children should be a priority. With thousands, some as young as less than one year of age, being victimized each year, Congress has a responsibility to respond swiftly and harshly to these human rights violations involving children. As a human rights issue, it is a national disgrace to do anything less.

Secondly, the courts have determined on numerous occasions that children warrant special protection under the law. Due to their vulnerability and inability to protect themselves, either mentally or physically, legal exceptions should be made to secure their rights and privileges. Child pornography is a form of child abuse and deserves special recognition and penalties in the law.

Finally, because of the *New York vs Ferber* case, Congress can act on this issue with Constitutionally tested legal precedent in the law. First Amendment questions regarding obscenity have been resolved by the court in the Ferber decision. Therefore, I would hope that the Committee will adopt the Ferber decision and attempt to formulate a law which needs little or no further Constitutional clarification.

We all recognize our nation's children as a national treasure. However, with each day that passes, more and more of our children are abused and exploited. Today, we have within our grasp the ability to put an end to this national disgrace. With over 110 Members of the House cosponsoring my bill there is a sizable resolve in the House regarding this issue. I implore you to act swiftly on behalf of these abused children and place the child pornography question as a top priority.

Mr. Chairman, I offer you my support as the Committee develops legislation addressing present shortfalls in the law. Again, my sincere appreciation for giving me this opportunity to speak on the crucial issue of child pornography.

Mr. HUGHES. We are going to recess at this point for about 10 minutes so we can catch our vote on the journal. We stand in recess.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

Our next witness is our distinguished colleague, Charles Pashayan, Jr., from the 17th District of California. Chip is presently serving his third term in the Congress. He serves on the Post Office and Civil Service Committee and the Interior and Insular Affairs Committee.

As a captain in the U.S. Army, Chip was stationed at the Pentagon for some 2 years.

In the Ford administration he was Special Assistant to the General Counsel at the Department of Health, Education and Welfare.

He is also the author of H.R. 2106, a bill to strengthen law enforcement in the areas of child exploitation and pornography.

Chip, we have your very excellent statement which, without objection, will be made a part of the record. You may proceed as you see fit.

TESTIMONY OF HON. CHARLES PASHAYAN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. PASHAYAN. Thank you very much, Mr. Chairman. I appreciate being here and, of course, I appreciate the fact that your subcommittee has focused on this problem involving this most despicable trade.

Mr. Chairman, I understand the reports prepared for the 95th Congress in 1978 revealed that over 260 magazines existing then depicted children engaging in sexually explicit conduct. And that in Los Angeles County alone, police reported some 30,000 children had been sexually exploited. So I am sure we are all aware that it is a widespread problem.

Let me plunge into what H.R. 2106 does. Laws addressing child pornography are on the books of all but three States, and in 20 States the statutes prohibit the distribution of material depicting children engaged in sexual conduct without the requirement that such materials be legally obscene.

One of these laws, that of the State of New York, was upheld by the Supreme Court in a decision rendered on July 2 in the *New York* versus *Ferber* case.

Mr. Chairman, H.R. 2106 would simply extend to the 1978 Federal Act the principle upheld by the Supreme Court in the *Ferber* decision, the principle that the knowing preparation and distribution in interstate commerce of materials depicting children engaged in sexual acts shall themselves violate Federal law.

Although the sales of such materials constitute a $1 million national business, law enforcement authorities tell us that sizable amounts of this material are traded, without money changing hands.

So to address this situation, H.R. 2106 would remove the requirement in the 1978 act that such materials need to be sold. In other words, the trading of them would be a criminal activity itself.

Mr. Chairman, on the question of the affirmative defense, let me say that there is no affirmative defense in H.R. 2106. I agree with your observation earlier that the affirmative defense, especially when put into the hands of the skilled defense counsel would so undo much of the *Ferber* decision that it would almost be useless for us to even pass the law. So I agree that if children are a specially protected class of people, then I don't think we should offer an affirmative defense at all.

It is a tough problem. I guess what H.R. 2106 does, Mr. Chairman, is to take a very simple and solid approach. All it says is "we have the *Ferber* decision." That has been upheld by the Supreme Court but the *Ferber* decision involves the State law. Let's make it Federal law. It is very simple, obviously constitutionally sound, and I think it will give the law enforcement authorities the flexibility and the punch that they need to get in and undo this horrible kind of a trade.

I would be glad to answer any questions that you all might have.

[The statement of Mr. Pashayan follows:]

TESTIMONY OF HON. CHARLES PASHAYAN, JR.

Mr. Chairman and members of the subcommittee, I am pleased that you are holding these hearings to focus the attention of the public and the Congress on the important issue of child pornography.

My primary concern in introducing H.R. 2106, The Child Protection Act of 1983, is, as the title suggests, to protect the innocent victims of this despicable trade. Reports prepared for the 95th Congress in 1978 reveal that over 260 magazines existed then that depicted children engaging is sexually explicit conduct, and that, in Los Angeles County alone, police reported that some 30,000 children had been sexually exploited. Faced with that and other evidence, the 95th Congress enacted the Protection of Children Against Sexual Exploitation Act.

Laws addressing child pornography are on the books of all but three states, and in twenty states, the statutes prohibit the distribution of material depicting children engaged in sexual conduct without the requirement that such material be legally obscene. One of these laws, that of the State of New York, was upheld by the United States Supreme Court in a decision rendered July 2, 1982, *New York*, v. *Ferber*.

Mr. Chairman, H.R. 2106 would simply extend to the 1978 Federal Act the principle upheld by the Supreme Court in the *Ferber* decision, the principle that the knowing preparation and distribution in interstate commerce of material depicting children engaged in sexual acts shall themselves violate Federal law.

Although sales of such materials constitute a million-dollar national business, law-enforcement authorities tell us that sizable amounts of this material are traded, without money changing hands. To address this situation, H.R. 2106 would remove the requirement in the 1978 Act that such materials need to be sold.

I am as concerned about free speech as anyone, Mr. Chairman, and you may hear testimony today about the dangers of enacting laws that interfere with the preparation of materials depicting children engaged in sexual acts or in sexually-explicit activities that have "serious literary, artistic, political, or scientific value," language taken from the Supreme Court's landmark decision in *Miller* v. *California*.

Mr. Chairman, as I said at the outset, my first concern is to protect children. As Mr. Justice White observed in the *Miller* decision, "The prevention of sexual exploitation and abuse of children constitute a government objective of surpassing importance." That judgment is reflected in the fact that, as noted above, the Congress and the legislatures of forty-seven states have approved legislation dealing with child pornography.

The potential for permanent damage to youngsters exploited as models for child pornography has been reported extensively. There is general agreement among the experts that such activities result in these youngsters' being unable to develop healthy, affectionate relationships in later life, that they are prone to sexual dysfunctions, that they tend to become sexual abusers themselves, and that they are predisposed to such self-destructive behavior as drug and alcohol abuse and prostitution.

In addition, children whose actions have been recorded on film or videotape must live with the knowledge that their participation in pornography may haunt them for the rest of their lives.

It has been suggested to me that scenes such as one in the recent film, "The Exorcist," which the young girl simulates the act of masturbation, would be in violation of the law if H.R. 2106 is enacted.

Mr. Chairman, I would suggest today that perhaps it is time that the producers of motion pictures exercise some modicum of restraint. I find it hard to believe that "The Exorcist," a box-office success, would have made any less money without that scene.

Similarly, I have been told that the book, "Show Me," which is supposed to be an effort at sexual education for young people, would be proscribed by H.R. 2106.

That publication contains numerous photos of nude youngsters, some in sexually suggestive situations. I wonder how those youngsters will feel about themselves in twenty years. As Justice White's opinion in *Ferber* noted in a quotation from a member of the New York Legislature, "'It is irrelevant to the child (who has been abused) whether or not the material . . . has a literary, artistic, political, or scientific value.' "

As Ms. Florence Rush of Women Against Pornography pointed out in 1981, "Child Pornography is notorious for its ability to disguise itself (thinly or otherwise) as educational, artistic, or, in the name of sexual freedom, as political."

In short, Mr. Chairman, I find it difficult to believe that photos of nude children in sexually suggestive poses or engaged in sexual acts could have any "literary, artistic, political, or scientific value."

Mr. Chairman, the New York State law upheld by the Supreme Court in the *Ferber* decision has been, in the view of Ms. Rush and others, successful in reducing the amount of child pornography materials available for public sale in the State of New York.

There are other bills in the Congress this year addressing this issue, including bills that would provide an affirmative defense in prosecutions brought for the production or distribution of child pornography depicting certain categories of sexually explicit conduct.

There is no language allowing an affirmative defense in H.R. 2106 for the very good reason that such language would undercut the *Ferber* decision.

Perhaps it might be important to note here that the idea of an affirmative defense has been rejected in deliberations before committees of the other body this year.

Some of the other bills introduced in this House and in the other body also contain language to increase the age of children under these statutes from 16 to 18, to increase penalties, to include child pornography under the racketeer influenced and corrupt organizations (RICO) definition, and to accomplish other goals.

H.R. 2106 does not contain that additional language because, as I have stated previously, my aim is to bring Federal statutes on child pornography in line with the *Ferber* decision. That, to me, is the most important task before the Congress this year with respect to this area of the law.

The *Ferber* decision represents a resounding victory in the battle against the evils of child pornography. That victory must be extended to the Federal child pornography statutes. I sincerely hope that in considering the legislation before you on this issue that you and the members of your Committee reject any attempts to weaken the *Ferber* victory.

Mr. Chairman, the issue before you is the protection of children, one of the noblest of all the causes that come before us as legislators. I want to see legislation come out of the Congress this year applying and expanding the *Ferber* decision, and will work with you, the members of the Committee, and with my distinguished colleagues who have submitted legislation on this issue to achieve this goal.

Thank you for your time.

Mr. HUGHES. Thank you very much.

I have read your statement and it is an excellent statement. I commend you for it.

As I understand it, your bill is rather simple. It does two things: First, it eliminates the obscenity requirement altogether without any affirmative defense.

Mr. PASHAYAN. Yes, as I think you have made clear.

Mr. HUGHES. And it also eliminates the requirement that there be a commercial transaction to try to reach those folks who are trading or swapping this material.

Mr. PASHAYAN. In other words, we say money does not have to change hands in order for this to be a criminal offense.

Mr. HUGHES. Chip, how would you define the term "minor"? There is some question as to that.

Mr. PASHAYAN. There is some question, I suppose.

Mr. HUGHES. Increase the age to 18.

Mr. PASHAYAN. I don't feel strongly about it one way or the other. I guess I tend toward 16. You all are more familiar with that and I would more or less acquiesce to your judgment in that ruling.

Mr. HUGHES. You know, what troubles me is that sometimes it is very difficult to determine the age of a child. Quite often a U.S. attorney would be unable really to establish age from a photograph. Making it 18 possibly would enable us to reach youngsters who were in that 15, 16 age bracket without a great deal of evidentiary hearings and without the difficulty that, as you well know, accompanies that type of proof.

Mr. PASHAYAN. Mr. Chairman, your committee specializes in crimes and you have a much deeper knowledge of the ins and outs of that kind of distinction between 16 and 18. I would really defer to your judgment and the judgment of your subcommittee on that point.

I think the far more important point is the question of the affirmative defense.

Mr. HUGHES. I quite agree with you.

Mr. PASHAYAN. I would defer to your judgment on that.

Mr. HUGHES. Another thing that I find ironic is that current law requires the prosecution to establish that the producers actually procured the children. I don't know that that is required constitutionally or otherwise.

Do you think that perhaps we ought to be ending that connection? If we find a producer of this scum material actually in the process of producing it, why shouldn't he be held responsible without requiring the U.S. attorney to establish that that individual or firm actually produced it with the children, or procured the children?

Mr. PASHAYAN. I should think he ought to be held responsible if you are talking about the person who actually brings the child in and subjects the child to whatever photographic process or whatever, and initiates the whole thing.

Mr. HUGHES. That might be a separate offense.

Mr. PASHAYAN. Make that a separate offense, a separate and greater offense?

Mr. HUGHES. Separate, and I would think greater offense. Those that subject these children to that treatment certainly are, in my judgment, more culpable.

Mr. PASHAYAN. This material, Mr. Chairman, trades hands before it reaches, if we can use the word, the consumer, in a very specialized way here. I shouldn't want the law to be so ambiguous that it applied only to those who produced the materials. I think those who are engaged in the trading of it ought to be under strict——

Mr. HUGHES. They are covered. The problem is under existing law it is required, as I understand it, to establish that they not only produce the material but they procure the children. And it seems to me that you are talking about separate offenses. It seems to me that we could link the two, that those that procure and/or produce would be one class; those that produce but who do not actually procure, it would seem to me it would fall into a different category.

Mr. PASHAYAN. That might be a fair distinction to be made. I guess this is what I am saying. My only concern would be, and I am sure you and your counsels could iron it out, that there is a chain of activities that I suppose starts with the procurement and ends up with the ultimate viewer. I shouldn't want anyone involved in that chain of activities not to come under the force of the law that we are talking about.

Mr. HUGHES. I am talking about that.

Mr. PASHAYAN. I think that is all that I would be able to say on that point.

Mr. HUGHES. OK.

Mr. PASHAYAN. Once again, you all have a knowledge and feeling about the kinds of penalties that ought to be involved in activities that are related but might be distinguished one from the other, and as long as everybody in that chain is going to come under the force of the law, I think that is the important thing.

Mr. HUGHES. OK. Thank you.

The gentleman from Michigan.

Mr. SAWYER. I have no questions. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from Florida.

Mr. SMITH. Thank you, Mr. Chairman.

In looking at this I certainly agree that it is one approach and certainly it is a simplified approach to curing some of the problems. I don't know any better than anyone else does whether 16 or 18—or 17—is constitutionally protected.

My impression would be that a minor by constitutional definition is 18 at this moment, so maybe if we wanted to be consistent we would certainly just make a minor as 18 for constitutional protection.

What do you imagine would be the circumstance, for instance, of a possible prosecution of a retail store that had this kind of product on sale? I am curious. There has always been a problem at the State level even about striking out as you do "knowingly." Some of these big chain supermarkets, et cetera, get thousands of different types of magazines which they put on sale. Some of those magazines contain a lot of material other than just sexually explicit material.

What would be the circumstance under which you might be able to prosecute somebody, for instance, a large retail chain who might have had this in there by mistake, these magazines may have been shipped to them? There is nothing in the statute which will allow them to avoid liability on the grounds of mistake. You are taking out "knowingly" and they just sell this. I am just curious as to what you envision because there has been a problem over the years in this as well.

Mr. PASHAYAN. I guess all I can say at this moment—it is a difficult question—would be that the prosecution would have some discretion but I am not so sure that H.R. 2106 removes knowing. It is the knowing preparation in distribution. That is the crime. I think in that case, if I am not mistaken, ignorance would be a defense. I think the *Ferber* principle involves a knowing action.

Mr. SMITH. Perhaps I am wrong but in your bill, line 4, on page 2, says, subsection 82, by striking out "for the purpose of sale or distribution for sale, or knowingly sells, or distributes for sale, any obscene," and inserting thereof, "sells or distributes any"—which removes the word "knowingly."

I am curious. You know, there is always a problem. I want to foresee any possible circumstances, and I am drawing on my previous experiences as the chairman of the Criminal Justice Committee in the State legislature who went through this process and had people come and say, we have literally hundreds and hundreds of magazines every month. Do we need to go through every page of every magazine that we sell? I mean, we are a legitimate enterprise. We have hundreds of stores, et cetera. Are we to be put to the task of being prosecuted in every State by every prosecutor because every time we sell one of the magazines it is a crime in every Federal district?

Mr. PASHAYAN. I appreciate that. I think we are dealing here in such a despicable trade. I would rather see the problem taken care of by the discretion of the prosecution and the grand jury process than to put in a defense which in effect might not be unlike the affirmative defense and undo so much of it that the law would lose much of its punch.

After all, we are not talking about adults here, we are talking about children who are presumed to be helpless when it comes to this conduct.

Yes; if someone is suffering a mistake, a genuine mistake, a fact, as to the existence of these kinds of materials, other materials he was selling, we would have to think long and hard before we would put that man or woman behind bars.

But let that element of knowing rest in prosecutorial considerations and grand jury rather than to put a defense into the law that might open it up.

Now, if you could design a defense that was very narrow and very explicit, very precise, to cover just that point where a very clever lawyer could not use it to get people off who we all want to catch in the net here—and then, once again, with the experience of you and your counsel that kind of defense could be designed, I think that is a competent point.

It is all in the precision of the language, I am sure.

Mr. SMITH. Thank you. Thank you, Mr. Chairman, I have no further questions.

Mr. HUGHES. The gentleman from Florida, Mr. Shaw.

Mr. SHAW. Thank you, Mr. Chairman. I have no questions but I would like to congratulate the witness on an excellent statement.

Mr. HUGHES. Yes; thank you, Chip.

Mr. PASHAYAN. Thank you.

Mr. HUGHES. You were most helpful and we commend you for your leadership.

Mr. PASHAYAN. I also look forward to working with you all and will be interested in the product that you finally come up with.

Mr. HUGHES. We are hopeful of moving right along.

Mr. PASHAYAN. Thank you very much.

Mr. HUGHES. Our next witness this morning is Mark Richard, the Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

Since graduating from Brooklyn Law School in 1967, Mr. Richard has been continuously employed by the Criminal Division of the Justice Department in a succession of increasingly responsible positions.

He has served as Deputy Assistant Attorney General for General and International Litigation; as Deputy Assistant Attorney General for Policy and Management; as Chief of the Fraud Section; and as Executive Director, Attorney General's White Collar Crime Committee, just to name a few of them.

He has received numerous awards and is a member of the New York State Bar and the District of Columbia Bar Association.

Mr. Richard, we welcome you on behalf of the Subcommittee on Crime this morning. We have your prepared statement which, without objection, will be made a part of the record in full. You may proceed as you see fit. Good morning.

TESTIMONY OF MARK RICHARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. RICHARD. Good morning, sir. Thank you.

Let me begin by apologizing to you, Mr. Chairman, and to the members of the subcommittee for any inconvenience I may have caused in the scheduling of this hearing.

Mr. HUGHES. We are just delighted to have you this morning.

Mr. RICHARD. Thank you, sir.

Mr. HUGHES. You are a busy man.

Mr. RICHARD. With your permission, I will just summarize the highlights of my remarks.

Mr. HUGHES. That would be fine.

Mr. RICHARD. Of course, I am pleased to be here today on behalf of the Department of Justice to discuss issues surrounding the sexual exploitation of children and child pornography. Efforts to improve the Federal statutes in this area and otherwise to combat the sexual exploitation of children undoubtedly deserve the attention of the Congress and the administration.

As one measure of the importance with which we view these crimes, the administration has included proposals to strengthen the child pornography laws in its Comprehensive Crime Control Act of 1983 which has been introduced in the House as H.R. 2151.

Turning first to the enforcement of the Federal sexual exploitation of children statutes, as you know, 18 U.S.C. 2251 makes it unlawful to use or induce a minor to engage in sexually explicit conduct for the purpose of producing materials depicting such conduct, provided the statute's requirements as to interstate or foreign commerce or mail are met.

Section 2252 reaches the product of this and other conduct involving the sexual exploitation of children.

Finally, section 2423 makes it unlawful to transport a minor in interstate or foreign commerce with the intent that the minor engage in prostitution or sexual conduct if the person transporting the minor has knowledge that this conduct will be commercially exploited.

Since May 1977, 67 persons have been indicted under all available obscenity statutes, including obscenity statutes which are not limited to child pornography, for distribution of obscene material depicting minors; 56 defendants have been convicted; none has been acquitted; charges against 10 are still pending; and one defendant committed suicide.

Indictments naming 28 of the above-mentioned defendants included charges under 18 U.S.C. 2252; 23 defendants were convicted of this violation; two were convicted of other obscenity violations; and cases involving two defendants charged under this section are still pending. One defendant charged under section 2252 committed suicide.

Regrettably, we have been singularly unsuccessful in developing prosecutions under 2251 of title 18. Because of the clandestine nature of the child pornography industry, it has proven extremely difficult to develop evidence that an individual was responsible for the production of mailed or shipped material.

Only four individuals have been indicted under 2251; two subsequently pled guilty to other charges under 2252, one of whom was sentenced to 8 years of imprisonment; one pled guilty to a conspiracy charge; and one case is still pending.

We work closely with the Postal Service, the Federal Bureau of Investigation, and the Customs Service. We feel we have developed an effective program for the prosecution of these violations.

Prosecutions under the White Slave Traffic Act, including 2423, traditionally have been referred by the FBI to the U.S. attorneys, who have been given a high degree of independence in the handling of these cases.

Prosecution statistics under 2423 are obtained from monthly reports. This data is reported by the U.S. attorneys only by reference to the principal statute involved in the case. Therefore, our statistics are limited to only those cases where 18 U.S.C. 2423 was the sole or principal violation. With this limitation in mind, we can report that during the fiscal years 1978 through 1982, charges were filed against 31 defendants under 2423; 26 defendants were convicted; one defendant was acquitted; and charges against one defendant were dismissed.

Before turning to the bills which would amend the child pornography provisions in sections 2252 and 53, I would like to discuss an aspect of 2423.

Jurisdiction over offenses under that statute extends to offenses taking place "within the District of Columbia." This anachronistic provision is not needed since the District of Columbia has its own criminal code which sets forth a number of prostitution offenses.

Several bills have been introduced in the House to amend the current Federal child pornography provisions. Among these is the administration's crime bill, H.R. 2151, particularly sections 1502 and 1604.

The administration's bill would strengthen the Federal child pornography provisions in the following three ways: Most importantly, in our opinion, by deleting the requirement that the production, receipt, transportation, and distribution of child pornography be for a commercial purpose.

Second, by adding child pornography offenses to the list of those for which court-ordered wiretaps are authorized and; third, by eliminating the obscenity requirement of the current child pornography law to the extent constitutionally permissible.

H.R. 2106 and H.R. 2432 also propose to amend the Federal child pornography laws. These bills, as well as those recently introduced by the chairman and Mr. Sawyer, as well as sections 1502 and 1604 of the administration's crime bills are in part in response to the Supreme Court's decision in *New York* v. *Ferber*, which held that the obscenity standard set forth in the *Miller* case does not apply to photographic or other depictions of children engaging in sexual conduct.

Current Federal law, in particular section 2252, prohibits the dissemination of material depicting children engaged in sexually explicit conduct only if the material is obscene.

H.R. 2106 and 2432 would remove the obscenity requirements for all categories of child pornography. On the other hand, the administration's bill would eliminate the obscenity requirement of 2252 only with respect to a visual or print medium which visually depicts a minor engaging in sexually explicit conduct.

Where the visual or print medium does not visually depict such conduct, for example in the case of a written description without photographs, the obscenity requirement of current law would be retained.

This distinction between visual and nonvisual depictions of children engaging in sexual conduct reflects our appreciation of the language in *Ferber* which recognized that a written depiction of sexual activities of minors that is not obscene probably continues to be protected by the First Amendment. Indeed, the New York statute upheld in *Ferber* only banned material which visually depicted sexual conduct by minors.

We point out that the obscenity standard in the administration's bill for nonvisual depictions of minors engaging in sexually explicit conduct would apply to a very small category of child pornography materials.

Elimination of the obscenity requirement in 2252, in our judgment, would obviously enhance the enforcement of this statute. In our view, deletion of this unnecessary element will streamline prosecutions. Since expert witnesses and other evidence are sometimes utilized by both sides to prove or disprove that the materials are obscene, eliminating this requirement would generally expedite preparation for trial and even the trial itself.

Another issue addressed by the various bills before the House, and the one which we regard as perhaps the most important of the proposed changes, is the elimination of the commercial-purpose limitation.

Utilization of 2252 has been inhibited by the fact that the statute covers the distribution of child pornography only for commercial purposes.

It is a fact, however, that perhaps most of the individuals who distribute materials covered by 2252 do so by trade or exchange without necessarily commercial purpose, and therefore avoid violation of the current provision of the act.

Moreover, those who use or entice children to engage in sexually explicit conduct for the purpose of creating a visual or print medium depicting such conduct do not violate 18 U.S.C. 2251 if their conduct is not for pecuniary profit. However, as we all recognize, the harm to children involved in child pornography schemes exist whether or not those who initiate or carry out these schemes have a profit mode or commercial purpose.

Amendment of the wiretap statute is a matter that also needs to be addressed if enforcement of the child pornography laws is to be improved.

Section 1604 of the administration's bill would amend the wiretap law, 2516 of title 18, to add child pornography offenses to the list of those for which a court-ordered interception of a wire or oral communication is authorized.

Traditional investigative techniques, such as interviews and grand juries, are not always effective in making prosecutable cases in this area. It has been difficult to obtain the cooperation of children who have been exploited, given their age and the desire of their parents to shield them.

Also, the offenses of distribution and receipt of child pornography are often the subject of secret dealings.

Wiretap authority for these offense would greatly assist the Department in lifting this veil of secrecy and gathering evidence against persons responsible for the sexual exploitation of minors.

Let me turn briefly to a discussion of some additional provisions in 2432 which are not included in the administration's proposal.

One such provision in H.R. 2432 pertains to assertion of an affirmative defense in prosecutions brought for the production or distribution of child pornography depicting certain categories of sexually explicit conduct.

The defense with regard to these categories would, under the proposal, be that "the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value."

We strongly oppose this aspect of the bill since it essentially retains the obscenity standard for certain categories of child pornography by way of an affirmative defense.

Thus, it significantly undercuts, in our judgment, the basic philosophy of *Ferber,* which authorized the elimination of the obscenity standard in the context of child pornography for the same categories of sexually explicit conduct to which H.R. 2432 applies this standard.

Moreover, it may prove an appealing loophole for pornographers intent upon thwarting the purpose of the statute by placing otherwise proscribed child pornography materials within a legitimate literary or scientific work.

Finally, we believe that the primary purpose of the proposed affirmative defense is to address concerns raised by authors and publishers of legitimate sex education books who fear that, without such a defense, their works would be reached by the antichild pornography law.

We do not believe that such works would be covered in light of the definition of "sexually explicit conduct" set out in 2253, particularly in conjunction with the requirement that the production of the material involve the "use" of a minor engaging in such conduct.

The creation of a statutory affirmative defense would, we believe, substantially undermine the basic purpose of H.R. 2432 to strengthen the Federal antichild pornography enforcement efforts.

Another problematic aspect of H.R. 2432 is its definition of the word "simulated," a term which is used but not defined in the current child pornography provisions.

We believe that the bill defines the term too narrowly and that certain conduct excluded by the definition should be included. For example, the requirement that the simulated sexual conduct exhibits any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera

H.R. 2432's definition of "simulated," in our view, could prove to be a significant loophole to imaginative pornographers.

In addition to the above problems presented by H.R. 2432, the bill includes an amendment to RICO statutes. Specifically, the bill would make violation of the Federal child pornography statutes a predicate offense for purposes of RICO.

We oppose the amendment to RICO statutes. The penalties for a violation of the Federal child pornography laws are sufficiently severe, in our judgment, that RICO coverage with its 20-year maximum sentence is not necessary.

Moreover, in light of the complications which arise in RICO prosecutions, we believe its coverage should not be expanded except where a clear need exists.

Finally, two other points deserve mention.

First, the bill would amend the definition of "minor" for purposes of the Federal child pornography statutes by including within this term any person under the age of 18, rather than 16 years as under current law.

Although the 16-year age limit was in essence approved in *Ferber*, we do not believe that the Court precluded the possibility of an 18-year-old age limit for minors protected by a child pornography statute.

Finally, H.R. 2432 would increase the fines applicable to violations of the Federal child pornography statutes from $10,000 to $75,000 for the first offense and from $15,000 to $150,000 for any subsequent offense.

While we support increasing fines as a greater deterrent to the commission of crimes involving the sexual exploitation of children, we believe that the fines applicable to many other criminal offenses should also be increased.

Title II of the administration's crime bill takes a comprehensive approach to increasing maximum fine levels applicable to criminal offenses and to specifying the criteria to be considered in the imposition of fines.

Again, thank you for the opportunity to present the view of the Department of Justice on this most crucial issue.

I would be pleased at this point to answer any questions you may have.

[The statement of Mr. Richard follows:]

STATEMENT OF MARK RICHARD, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

I am pleased to be here today on behalf of the Department of Justice to discuss issues surrounding the sexual exploitation of children and child pornography. In particular, I shall address the enforcement of 18 U.S.C. §§ 2251-2253 and 2423, known collectively as the protection of Children Against Sexual Exploitation Act of 1977, and bills which would amend several of these provisions. Efforts to improve the federal statutes in this area and otherwise to combat the sexual exploitation of children undoubtedly deserve the attention of the Congress and the Administration. The shocking nature of the crimes involved and the indelible mark such crimes leave on their young victims are of serious concern to the Department of Justice. As one measure of the importance with which we view these crimes, the Administration has included proposals to strengthen the child pornogrphy laws in its Comprehensive Crime Control Act of 1983, which has been introduced in the House as H.R. 2151.

Turning first to the enforcement of the federal sexual-exploitation-of-children statutes, as you know 18 U.S.C. § 2251 makes it unlawful to use or induce a minor to engage in sexually explicit conduct for the purpose of producing materials depicting such conduct, provided the statute's requirements as to interstate or foreign commerce or mail are met. Section 2252 reaches the product of this and other conduct involving the sexual exploitation of children. It prohibits the transportation, receipt, and sale of obscene materials depicting sexual conduct by children, provided the transportation or receipt is for the purpose of selling the materials or distributing them for sale. The requisite jurisdictional basis must also be shown under section 2252. Finally, 18 U.S.C. § 2423 makes it unlawful to transport a minor in interstate or foreign commerce with the intent that the minor engage in (1) prostitution or (2) sexual conduct if the person transporting the minor has knowledge that this conduct will be commercially exploited.

Since May of 1977, 67 persons have been indicted under all available obscenity statutes (including obscenity statutes which are not limited to child pornography) for distribution of obscene material depicting minors; 56 defendants have been convicted; none have been acquitted; charges against ten are still pending; and one defendant committed suicide. In some of these cases, 18 U.S.C. §§ 1461 and 1462, which are general obscenity statutes, have been used to prosecute child pornography cases because these two provisions lack the commercial-purpose limitation found in the child pornography statutes. I shall discuss this commercial-purpose limitation of the child pornography statutes in greater detail later in my statement.

Indictments naming 28 of the above-mentioned defendants included charges under 18 U.S.C. § 2252; 23 defendants were convicted of this violation; two were convicted of other obscenity violations; and cases involving two defendants charged under this section are still pending. One defendant charged under 18 U.S.C. §2252 committed suicide.

Regrettably, we have been singularly unsuccessful in developing prosecutions under 18 U.S.C. §2251. Because of the clandestine nature of the child pornography industry, it has proven extremely difficult to develop evidence that an individual was responsible for the production of mailed or shipped material. Only four individuals have been indicted under 18 U.S.C. § 2251; two subsequently pled guilty to other charges under 18 U.S.C. § 2252 (one of whom was sentenced to eight years of imprisonment); one pled guilty to a conspiracy charge; and one case is still pending.

We work closely with the Postal Service and the Federal Bureau of Investigation, which share investigative jurisdiction for violations of these statutes, and with the United States Attorneys, and we feel we have developed an effective program for the prosecution of these violations. In fact, all child pornography cases that have been brought to our attention by the investigative agencies here in Washington have been prosecuted except for a very few which were factually deficient for one reason or another; we are unaware of any unwillingness on the part of United States Attorneys to prosecute cases which have been brought directly to their attention. While the FBI, as an in-house investigative agency, has always directly referred these cases to United States Attorneys, in the past coordination with the Postal Service was maintained at the national level; that is, all Postal referrals were cleared through the Criminal Division before being sent out to United States Attorneys. However, as a result of the considerable expertise that Postal Inspectors developed in this area over the past several years, we authorized the Postal Service

to make direct referrals to United States Attorneys. In light of the extensive experience which Criminal Division attorneys have developed in the obscenity area, our guidelines in the United States Attorneys' Manual require United States Attorneys to consult with the Criminal Division before returning any indictments in these cases. Finally, attorneys in this Division have participated in special training seminars that have been held by both the FBI and the Postal Service dealing with the prosecution of child pornogrpahy offenses.

Prosecutions under the White Slave Traffic Act, including 18 U.S.C. 2423, traditionally have been referred by the FBI to United States Attorneys, who have been given a high degree of independence in the handling of these cases. Departmental guidelines provide that prosecution is generally limited to commercial prostitution activities, but that other violations of the statute may be prosecuted after consultation with the Division where warranted by the facts. Prosecution statistics under 18 U.S.C. § 2423 are obtained from monthly reports submitted by United States Attorneys to the Department. However, these data are reported by the United States Attorneys only by reference to the principal statute involved in the case. Therefore, our statistics are limited to only those cases where 18 U.S.C. § 2423 was the sole or principal violation. With this limitation in mind, we can report that during Fiscal Years 1978 through 1982 charges were filed against 31 defendants under 18 U.S.C. § 2423; 26 defendants were convicted; one defendant was acquitted; and charges against one defendant were dismissed. Once again, I would note that there may have been additional charges filed and dispositions obtained under 18 U.S.C. § 2423 which were reported by United States Attorneys under other statutes and which, therefore, have not been picked up in our statistical reporting system.

Before turning to the bills which would amend the child pornography provisions in 18 U.S.C. §§ 2252-2253, I would like to discuss an aspect of 18 U.S.C. § 2423. Jurisdiction over offenses under that statute extends to offenses taking place "within the District of Columbia." This anachronistic provision is not needed since the District of Columbia has its own criminal code which sets forth a number of prostitution offenses. I would also note that similar language is included in the parallel provisions in sections 2421 and 2422 dealing with adult prostitution.

Several bills have been introduced in the House to amend the current federal child pornography provisions. Among these is the Administration's crime bill, H.R. 2151, particularly sections 1502 and 1604. The Administration's bill would strengthen the federal child pornography provisions in the following three ways: (1) most importantly, by deleting the requirement that the production, receipt, transportation, and distribution of child pornography be for a commercial purpose; (2) by adding child pornography offenses to the list of those for which court-ordered wiretaps are authorized; and (3) by eliminating the obscenity requirement of the current child pornography law to the extent constitutionally permissible.

Two other bills, H.R. 2106 and H.R. 2432, also amend the federal child pornography laws. These bills, as well as sections 1502 and 1604 of the Administration's crime bill, H.R. 2151, are in part a response to the Supreme Court's decision in *New York* v. *Ferber*, 102 S. Ct. 3348 (1982), which held that the obscenity standard set forth in *Miller* v. *California*, 413 U.S. 15 (1973), does not apply to photographic or other depictions of children engaging in sexual conduct. Current federal law, 18 U.S.C. § 2252, however, prohibits the dissemination of material depicting children engaging in sexually explicit conduct only if the material is obscene.

H.R. 2106 and H.R. 2432 would remove the obscenity requirement of 18 U.S.C. § 2252 for all categories of child pornography. On the other hand, the Administration's bill would eliminate the obscenity requirement of 18 U.S.C. § 2252 only with respect to a visual or print medium which visually depicts a minor engaging in sexually explicit conduct. Where the visual or print medium does not visually depict such conduct, for example, in the case of a written description without photographs, the obscenity requirement of current law would be retained.

This distinction between visual and non-visual depictions of children engaging in sexual conduct reflects the Department's position that certain language in *Ferber* recognized that a written depiction of sexual activities of minors that is not obscene probably continues to be protected by the First Amendment. Indeed, the New York statute upheld in *Ferber* only banned material which visually depicted sexual conduct by minors. As a practical matter, we point out that the distinction we are suggesting between visual and non-visual depictions of minors engaging in sexually explicit conduct has little significance with respect to potential violations of 18 U.S.C. § 2252. In any case a violation can only exist if "the producing of [the] visual or print medium involves the use of a minor engaging in sexually explicit conduct." We are unaware of any instances in which such use of a minor has occurred for the purpose of facilitating a purely written description of the sexual conduct. Thus, the

obscenity standard in the Administration's bill for non-visual depictions of minors engaging in sexually explicit conduct would apply to a very small category of child pornography materials.

Elimination of the obscenity requirement in 18 U.S.C. § 2252 would obviously enhance the enforcement of this statute. Although we believe that few if any prosecutions have not been brought or not been successful in the past because of the obscenity requirement, in our view deletion of this unnecessary element will streamline prosecutions. Since expert witnesses and other evidence are sometimes utilized by both sides in seeking to prove or disprove that the material is obscene, eliminating this requirement will generally expedite preparation for trial and the trial itself.

Another issue addressed by all three bills, and the one which we regard as perhaps the most important of the proposed changes, is the elimination of the commercial-purpose limitation. Utilization of 18 U.S.C. § 2252 has been inhibited by the fact that the statute covers the distribution of child pornograpy only for commercial purposes. It is a fact, however, that many, perhaps even most, of the individuals who distribute materials covered by 18 U.S.C. § 2252 do so by trade or exchange, without any commercial purpose and thereby avoid violating this provision. Moreover, those who use or entice children to engage in sexually explicit conduct for the purpose of creating a visual or print medium depicting such conduct do not violate 18 U.S.C. § 2251 if their conduct is not for pecuniary profit. Nevertheless, the harm to children involved in child pornography schemes exists whether or not those who initiate or carry out these schemes have a profit motive or commercial purpose.

H.R. 2106 removes the commercial-purpose limitation of current law in a manner consistent with the Administration's bill. However, we note that H.R. 2432 deletes more language than is necessary from 18 U.S.C. § 2252(a)(2) merely to eliminate the commercial-purpose limitation of that provision. Specifically, H.R. 2432 would strike from current law not only the commercial-purpose limitation applicable to the offenses of knowingly receiving or distributing child pornography materials, but also would strike (we believe inadvertently) the underlying offenses of selling or distributing.

Amendment of the Wiretap statute is also a matter that needs to be addressed if enforcement of the child pornography laws is to be improved. Section 1604 of the Administration's bill would amend the wiretap law, 18 U.S.C. § 2516, to add child pornography offenses to the list of those for which a court-ordered interception of a wire or oral communication is authorized. As I indicated earlier, the clandestine nature of the child pornography industry has made it extremely difficult to prosecute those who use children to produce poronographic material. Traditional investigative techniques, such as interviews and grand juries, are not always effective in making prosecutable cases. Moreover, it has been difficult to obtain the cooperation of children who have been exploited, given their age and the desire of their parents to shield them from embarrassment and from involvement in judicial proceedings. Also, the offenses of distribution and receipt of child pornography are often the subject of secret dealings. Wiretap authority for these offenses would greatly assist the Department in lifting this veil of secrecy and gathering evidence against persons responsible for the sexual exploitation of minors. The failure of H.R. 2106 or H.R. 2423 to amend the wiretap statute is in our judgment a serious defect. We urge the Subcommittee to include such an amendment in whateve legislation it recommends to the full Committee.

Let me now turn briefly to a discussion of some additional provisions found in H.R. 2432 which are not included in the Administration's proposal. One such provision is H.R. 2432's language providing for the assertion of an affirmative defense in prosecutions brought for the production or distribution of child pornography depicting certain categories of sexually explicit conduct. The defense with regard to these categories would be that "the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value." We strongly oppose this aspect of the bill since it essentially retains the obscenity standard for certian categories of child pornography by way of an affirmative defense. Thus, it significantly undercuts the basic philosophy of *Ferber*, which authorized the elimination of the obscenity standard in the context of child pornography for the same categories of sexually explicit conduct to which H.R. 2432 applies this standard. Significantly, the Senate Subcommittee on Juvenile Justice, which recently considered S. 57, a bill identical to H.R. 2432, voted to delete this affirmative defense in the version of the bill it reported to the full Judiciary Committee.

Even in the absence of the affirmative defense provided in H.R. 2432, a defendant may take the position that the application of the child pornography statute to his case is unconstitutional and falls within the "tiny fraction of the materials within the statute's reach" which the Court recognized should receive constitutional protec-

tion. 102 S. Ct. at 3363. Thus, the affirmative defense provision (which was not in the New York statute approved in *Ferber*) is unnecessary. Including an affirmative defense provision in the federal child pornography statute in our view would produce consequences far beyond protecting the small class of materials referred to by the Court. It may provide an appealing loophole for pornographers intent upon thwarting the purpose of the statute by placing otherwise proscribed child pornography materials within a legitimate literary or scientific work. Proving the defense—that the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value—would not be difficult in such cases. The affirmative defense proposed in H.R. 2432 is practically an invitation to distribute child pornography in a conviction-proof medium.

Finally, we believe that the primary purpose of the proposed affirmative defense is to address concerns raised by authors and publishers of legitimate sex education books who fear that, without such a defense, their works would be reached by the anti-child pornography law. We do not believe such works would be covered in light of the definition of "sexually explicit conduct" set out in 18 U.S.C. § 2253, particularly in conjunction with the requirement that the production of the material involve the "use" of a minor engaging in such conduct. Given the concerns expressed by publishers, however, it should be noted that the Department does not view the bills I have discussed as designed to reach legitimate sex education material. The creation of a statutory affirmative defense would, we believe, substantially undermine the basic purpose of H.R. 2432—to strengthen federal anti-child pornography enforcement efforts.

Another problematic aspect of H.R. 2432 is its definition of the word "simulated," a term which is used but not defined in the current child pornography provisions. The bill defines this term to mean "the explicit depiction of any ['sexually explicit conduct' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks." We believe that the bill defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions. For example, the requirement that the simulated sexual conduct exhibit any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera. H.R. 2432's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.

In light of these concerns, we believe that the term "simulated" should not be defined or that the definition should not require the exhibiting of any uncovered portion of the genitals or buttocks. The latter solution, significantly, was adopted by the Senate Subcommittee in its consideration of S. 57.

In addition to the above problems presented by H.R. 2432, the bill includes an amendment of the Racketeer Influenced and Corrupt Organizations (RICO) statutes, 18 U.S.C. Chapter 96. Specifically, the bill would make violation of the federal child pornography statutes a predicate offense for purposes of RICO.

We oppose H.R. 2432's amendment of the RICO statutes. The penalties for a violation of the federal child pornography laws are sufficiently severe (10 years for a first offense and 15 years for a second offense, in addition to the increased fines under the bill) that RICO coverage with its 20-year maximum sentence is not necessary. Moreover, in light of the complications which arise in RICO prosecutions, we believe its coverage should not be expanded except where a clear need exists. Again, we note that the Senate Subcommittee eliminated the RICO provision from the version of the bill it reported.

Finally, we mention two other aspects of H.R. 2432 which differ from the Administration's bill but on which we take no strong position. First, the bill would amend the definition of "minor" for purposes of the federal child pornography statutes by including within this term any person under the s, rather than 16 years as under current law. Although the 16-year age limit was in essence approved in *Ferber*, we do not believe that the Court precluded the possibility of an 18-year limit for minors protected by a child pornography statute. Moreover, the retention of the 16-year age limit in the Administration's bill does not reflect a conscious rejection of a possible 18-year age limit.

The amendment to raise the age of a "minor" has some advantages from the standpoint of enforcement. Some obscene material depicts children who are clearly under the age of sixteen; however, the age of the child is not so readily apparent in other obscene material. In the latter cases it may be necessary to identify the child and offer proof of age in order to establish this element of the offense. In light of the clandestine fashion in which such obscene films and magazines are produced, this is often extremely difficult. Unless we have such proof of age, we may be forced,

as a practical matter, to limit prosecutions to cases where the subjects depicted in the material are clearly younger than sixteen. If the law were amended to protect minors under the age of 18, rather than 16, it would be easier to prosecute cases in which 14- or 15-year-olds have been sexually exploited, but regarding whom actual proof of age is not available.

However, there is the countervailing consideration that, as amended by H.R. 2432, the federal child pornography statutes would also extend their reach under the new constitutional standard to 16 and 17-year olds, whom for some purposes society regards as adults. On balance, therefore, we believe the appropriate definition of the term "minor" for purposes of the federal child pornography provisions is a moral judgment best left to a dermination by Congress.

Finally, H.R. 2432 would increase the fines applicable to violations of the federal child pornography statutes from $10,000 to $75,000 for the first offense and from $15,000 to $150,000 for any subsequent offense. While we support increasing fines as a greater deterrent to the commission of crimes involving the sexual exploitation of children, we believe that the fines applicable to may other criminal offenses should also be increased. Current fine levels generally reflect monetary values of prior decades and are too low to be realistic measure of the gravity of the offense committed. Title II of the Administration's crime bill takes a comprehensive approach to increasing maxium fine levels applicable to criminal offenses and to specifying the criteria to be considered in the imposition of fines. Moreover, the Administration's bill would increase maximum fines to a higher level than would H.R. 2432.

Again, thank you for the opportunity to present the views of the Department of Justice on federal efforts to combat the sexual exploitation of children and bills currently under consideration in this regard. I would be pleased at this point to try to answer any questions that you or other members of the Subcommittee may have.

Mr. HUGHES. Thank you, Mr. Richard, for an excellent statement.

Let me just ask you. If the visual portrayal is of a minor's face with a sketched sexually suggestive pose, would that be covered under existing law?

Mr. RICHARD. Just of the face? I don't believe so.

Mr. HUGHES. With a sketch of the body and other exposed parts in a sexually suggestive pose or embrace?

Mr. RICHARD. I don't believe it would by itself be sexually explicit conduct under the definition.

Mr. HUGHES. Should it be?

Mr. RICHARD. Approaching the question in terms of the impact on the child, I could see a photographer just snipping out a minor's face, attaching it without any knowledge or participation, if you will, of the minor, to begin with.

Mr. HUGHES. It certainly could have an impact in later years on the minor.

Mr. RICHARD. It is a privacy concern—obviously, in the context of privacy issues, it certainly could be. In terms of the emotional trauma, the child is not participating in these sexually explicit behaviors; thus I suspect that you have a different context.

Mr. HUGHES. What if in the print form it identifies the individual by name?

Mr. RICHARD. Again, you have a privacy issue and one that certainly has a detrimental impact, or potential impact, on the child. I think what we tend to be primarily concerned about, what we are seeing, is more of the direct participation of the child in these sexually explicit acts.

Mr. HUGHES. In your testimony, and I think quite correctly, you make a very basic distinction as does the administration's omnibus crime bill—which, I might say parenthetically, is going nowhere in Judiciary, as all crime bills of that nature on this side of the Con-

gress do—between visual and print, as does, I think the Supreme Court in its decision.

Obviously, we are trying to focus our concerns in the areas where it presents the greatest risk to youngsters, and that is visual depiction.

Can you see perhaps a loophole for the pornographers and peddlers if they can use a face and a sketch, and a name, that they can attach to it, or a photograph of a body, with a sketched face? Do you think that could present another area that would be lucrative to those trafficking this type of stuff?

Mr. RICHARD. I think, Mr. Chairman, it probably comes down to an evidentiary issue of whether we could prove, for example, that the child did, in fact, participate, or associate himself or herself with sexually explicit conduct as defined in the act. The mere fact that you are talking about it later showing up in the media in a somewhat distorted fashion, I don't think would preclude us from prosecuting under the act.

What concerns me, though, is the fact that it can be done without reference to a particular child. You can snip out a photograph from a magazine of a child's face and then manipulate it and come up with your cartoon situation.

Mr. HUGHES. Has the inability to establish that a youngster is under the age of 16 presented a problem to the prosecutions?

Mr. RICHARD. Yes; it has.

Mr. HUGHES. Can you give us any data? You probably are not prepared to do it today but can you submit some data to us that bears on that issue, because that is going to be a very relevant concern for this committee as to whether we should increase that from 16 to 18, or whatever.

Mr. RICHARD. Our experience is that we have major difficulties locating the child. The child, in fact, may be abroad, some of the material appears to be produced abroad—and therefore establishing the age of the child becomes an evidentiary nightmare unless the child is of such minor years that it becomes apparent from the photograph.

So what you have in effect now is that as a practical matter we are not talking about a 16-year-old threshold as currently portrayed in the act, but rather something in the neighborhood of 14 or less, just because you must rely on the obvious minor character of the child rather than being in the position to prove definitively that the child is in fact under 16.

If you could provide some assistance to us, that would be helpful.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. Yes; The statistics on the number of prosecutions are 77 convictions, or something of that order, as I recall. How many of those were Federal?

Mr. RICHARD. These are all Federal.

Mr. SAWYER. All Federal?

Mr. RICHARD. Yes, sir.

Mr. SAWYER. As I understand it, the Post Office now is only—to the extent they are doing some policing—are only picking out commercial violations under Department of Justice guidelines for turning over for prosecution. Is that true?

Mr. RICHARD. No; that is not my understanding of current practice. We are capable of reaching the noncommercial situation under the general obscenity statutes, 1461 through 65. The trouble, of course, with those statutes is that the penalties aren't severe enough, in our judgment they are only 5 years for the first offense.

However, a lot of these cases involve noncommercial situations. They tend to cluster, at least those that involve use of the mail coming in from abroad, in certain locations, in particular, Los Angeles, New York, or the District.

We have advised the U.S. attorney's offices that in evaluating these noncommercial cases they can consider a variety of factors in terms of prioritizing the cases. We have suggested that they work closely with local prosecutors to ensure that if there is a Federal declination, there is in effect some possible action on the State level as generally concurrent jurisdiction exists in these offenses.

We have prosecuted noncommercial cases. There is no prohibition on it now.

Mr. SAWYER. The Michigan State statute uses 18, whereas, statutory rape is under 16. And the reason, as I understood it, and I checked into it, was because of the very difficulty you talked about and the difficulty in estimating the age of the child when the picture is not being able to find out positively. It seems to work quite satisfactorily.

Are you inclined to go with an 18 age?

Mr. RICHARD. Ultimately, as the statement indicates, it is a congressional judgment. My own practical sense is that I prefer 18 because I know that I am going to have difficulty proving the age of the child and that will enable me to prove the 16-year-old much easier, so in that sense, yes.

But it does pose other questions when you go to 18. You have other indicia of adulthood, if you will; you are dealing with an 18-year-old or 17½, or married family people in their own right. Do you want to afford them this kind of treatment?

Mr. SAWYER. Do you think that again that might affect the Supreme Court's judgment on it?

Mr. RICHARD. Our sense is that while the New York statute involved was a 16-year-old statute, the Supreme Court did not preclude an 18-year-old standard.

Mr. SAWYER. About any other purpose, at least under Michigan law for comparison, I think only voting is about the only thing you have to be 18. Seventeen, you are subject to—well, criminal prosecution, at the age of 17 you are no longer a juvenile for criminal purposes.

Mr. RICHARD. I would add a certain amount of inconsistency permeates the whole area. The Mann Act provisions are 18; 2252 talks about 16. Consistency is not the trademark of the code.

Mr. SAWYER. I yield back.

Mr. HUGHES. The gentleman from Florida, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I appreciated your remarks. Mr. Richard. I also take notice of the intelligence you made in choice of law schools you graduated from. [Laughter.]

Mr. HUGHES. I won't hold that against you.

Mr. RICHARD. The same year.

Mr. SMITH. No, no, no, I graduated well before, unfortunately.

Let me ask you two things which you mentioned which struck me as a little bit odd in reading some of the material. After writing down my notes, I noticed that they were set forth by staff also in certain questions. Let me get to the first one.

In your opening statement, you said that you had achieved 56 out of 67 convictions; 10 were pending, and one gentleman or lady chose suicide rather than conviction.

Why would you then be so much disposed to removing the obscenity requirement which apparently is no bar to successful prosecution to you and which may open a Pandora's box, which right now does not exist in terms of ultimately a situation where something will be statutorily prohibited, but which in another part of the Constitution possibly is constitutionally protected?

Mr. RICHARD. Let me answer by pointing to two statements.

Mr. SMITH. In other words, how would it help you in prosecution if in fact you have achieved a 100-percent record in the cases that have been brought to trial?

Mr. RICHARD. I think the *Ferber* decision is the best example. That involved prosecution under both an obscenity related statute and the statute which the Court considered, which had no obscenity standard. The jury did, in fact, acquit on the obscenity statute. They convicted on the nonobscenity standard just on the child pornography portion, if you will.

While we haven't had a case like that, we can certainly envision one coming up. I would not answer your question by talking about hypothetical cases. I think you would more go to the question of streamlining the prosecution. Right now with an obscenity standard it frequently degenerates into a battle of experts and here we are really talking about protecting against the harm to the child, if you will. That becomes an overriding concern as recognized by the Supreme Court.

If you notice, though, in terms of all the possible ways of enhancing our enforcement ability in this area, I suggested that the removal of the commercial requirement is from our vantage point more important. By and large, I would agree with you. In most instances just the showing of the materials to the jury will more than likely take us over the obscenity hurdle, given the nature of the materials often involved.

Mr. SMITH. Second, you spoke in terms of not favoring the proposed amendments to the RICO statute.

Mr. RICHARD. Yes.

Mr. SMITH. That the fines, et cetera, are sufficiently broad and the penalties sufficiently valid for the purpose of that. I am a little bit surprised, since from my knowledge, having served on the Florida State Organized Crime Commission, and having been involved in this for quite a while, it seems to me that organized crime has been a very strong presence in the whole area of pornography, especially child pornography.

I would also venture that forfeiture, which is allowable in the RICO, and which is not allowable under these statutes, has been a very effective weapon. We use it in Florida. I mean, we have confiscated hundreds of thousands and millions of dollars worth of equipment, houses, cars that are used to transport and store; shops, the

places where they do it; the films are made where the material is originally produced.

I don't really see the argument in terms of RICO. I would be more than happy as a prosecutor to have that secondary available to me under the RICO basis.

Mr. RICHARD. I agree with many of the points that you make. I think, though, on balance——

Mr. SMITH. Excuse me. Besides the general revenue aspect of whatever money we can churn out of this.

Mr. RICHARD. RICO, as you know, is a very controversial statute. To talk in terms of making child pornography a predicate offense, we suggest, opens up a whole new panoply of issues related to RICO and its appropriateness in certain factual settings. Given what we regard as fairly significant penalties under the Child Pornography Act, we are not sure that on balance it is worth it.

With respect to forfeiture that is a good point. However, if we are going the forfeiture route, I think we would probably favor a specific forfeiture provision independent of RICO.

I would just comment, because it is a point that we at Justice constantly go around and around on, and that is the involvement of traditional organized crime in the child pornography industry. That, of course, is a major concern of ours.

The assessment at this point is that traditional organized crime as we view it, tends to avoid going into the child pornography aspect of the pornography business, for a variety of reasons. That is the assessment I receive from the FBI at this point.

It is a question that we are constantly looking at. It is organized criminal behavior but I am trying to distinguish it from traditional organized crime.

Mr. SMITH. I don't know who you have been talking to but the information that I have been privy to over the years would lead me to believe very strongly that those who are in the child pornography business are directly involved in traditional organized crime or are elements of organized crime for which they receive the blessings of their business.

I will tell you that if you want the names of people to talk to about whether or not this is so I would be more than happy to provide that to you. But prosecution after prosecution in my State has revealed that the very same people who are involved in this business were previously and at the same time, and thereafter, linked constantly to organized crime—more than just the allegation, but in fact had been previously prosecuted with other organized crime figures.

I would just suggest to you that it is rather naive of you on the part of this administration. And I also feel that the timidity about RICO is a rather naive view. I view any thrust forward in terms of changing the law to get at them—I don't care if you make the penalty 200 years as long as you can justify that penalty. It is a heinous crime.

What is the statute all about anyway? Is it because we ferret them out and convict them? It is basically deterrence if they feel that they are going to be given such a penalty if caught that maybe the act of committing it is not worth the ultimate risk, then possibly that will be something that will deter them. Then we are talk-

ing about RICO being a very effective weapon, because they are in it to make money.

While inherently some of them may be emotionally disturbed people themselves, even the products of child abuse, bad homes, as you know, the fact that they are in it means that they are trying to make a buck at it, but they are making good money. Frankly, if I was going to be the one who had to decide I would certainly come down on the side of having the most deterrent capability I could. I would hit them where they live, and that is in the pocketbook.

If you could forfeit everything that they had achieved and made over the years, I think they would think a little bit more about getting into it.

Mr. HUGHES. Would the gentleman yield?

Mr. SMITH. I would certainly yield.

Mr. HUGHES. Mr. Smith is the most liberal member of this subcommittee, I would say.

Mr. SMITH. I don't know when I got that name.

Mr. HUGHES. Just to show you how tough we are.

Go ahead, I'm sorry, Mr. Richard.

Mr. RICHARD. I am not sure that we are necessarily disagreeing, certainly not with respect to the threat and the heinous nature of these offenses.

As I indicated, the question of RICO application here is a balancing question. The forfeiture aspect, I agree, and I think we would certainly support some forfeiture provisions with respect to the child portion.

Mr. SMITH. For instance, you support having the wiretap provisions spill over into this statute. In essence, you are going most of the way with RICO but you don't want to call it such.

I just urge you to take another look at that. You may very well be falling over mostly into the area of RICO anyway.

Mr. RICHARD. Again, it is a question that RICO is, like I say, such a controversial statute that on balance we concluded that it is probably not worth the price to get into that area.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

Mr. Shaw.

Mr. SHAW. Thank you, Mr. Chairman.

In your text on this particular question in your testimony, is it a correct statement that most of the child pornography that is commercially produced, is produced outside of this country?

Mr. RICHARD. When you say most, I am not sure how to answer. I know the intelligence I receive from the various investigative agencies is that certainly a fair proportion of the material appears to be produced outside.

I have heard of instances where it is produced here and sent abroad for distribution, for duplication, and processing, and coming back.

There is certainly a foreign aspect to a good portion of it.

Mr. SHAW. Just about every State, I believe, has a statute on this particular issue. You point out in your testimony the fact that there haven't been many cases filed on the Federal level for the

production of this type of material, photographing, and that type of thing.

Is this true also on the State level?

Mr. RICHARD. My remarks were limited to 2251, which was the actual production, if you will, as opposed to the distribution.

Mr. SHAW. My question is limited to that, too.

Mr. RICHARD. I am not sure. I can find out to the extent we have some intelligence on that and supply it to you. I don't know the States' experience across the country with that point.

My sense is that they will probably be experiencing the same difficulties we are. But that is purely conjecture on my part.

Mr. SHAW. If it is not a great deal of trouble and if that figure has already been accumulated and readily available, I think it might be helpful to us.

Mr. RICHARD. I don't think we could obtain that information without an extensive allocation of staff time.

Mr. SHAW. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

Just one more question, Mr. Richard.

Earlier when I was discussing the existing law with Congressman Hutto of Florida, I asked him about existing law and the producers of the material, and the link to those that procure the children.

As I understand existing law, it requires that those that are producers to be convicted in that section of the statute also have to be shown as the procurers of the children which is often difficult.

Is our reading of the law accurate?

Mr. RICHARD. "Procure" is a very strong word. At least it denotes a——

Mr. HUGHES. Solicits, entices, whatever it uses.

Mr. RICHARD. It also uses the word "use." And then I think something less than going out and affirmatively seeking. In that regard the mere use, as I read the statute, is already covered.

Mr. HUGHES. Has that been interpreted by the courts?

Mr. RICHARD. Not to my knowledge, Mr. Chairman.

Mr. HUGHES. I can conceive of some problems. I don't know why we should be connecting the two; why should there be a link between those that produce this stuff and those that are enticing and otherwise encouraging youngsters.

Mr. RICHARD. I would certainly argue that the statute currently covers it. I would not hesitate authorizing a prosecution where there was no evidence of going out and actively recruiting and yet there was a use, a knowing use. It certainly, I agree with you, could be clarified but I would venture to say the statute already reaches it.

Mr. HUGHES. I trust that you are fairly much in accord with the new Senate language on the definition of simulation?

Mr. RICHARD. I understand that we still have some problems.

Mr. HUGHES. In S. 57?

Mr. RICHARD. Yes; I haven't studied it. I understand there have been some changes. My understanding is we still may have some problems with respect to simulation.

Mr. HUGHES. All right.

Mr. SMITH. Mr. Chairman, if I might——

Mr. HUGHES. Mr. Smith.

Mr. SMITH. I appreciate it. To follow up on what you previously asked Mr. Richard in reference to the use and procurement, given the answer you made with reference to the fact that you believe use would be covered and, therefore, if the producer just literally had somebody say, look, this is a kid I know you are involved in here, he wants to cooperate, and there was no active solicitation but in fact only the use. And given the fact that the statute, while having some deficiencies, still allowed you to make a 100-percent conviction rate of those cases that came to trial—I am a little curious. And I didn't get a satisfactory answer, in my estimation, to the reason why so few cases have been brought between 1977 and 1982 given the ever-increasing numbers of instances of child pornography, openly revealed almost everywhere.

I am just curious as to what you would attribute that to?

Mr. RICHARD. Let me say that it has always been a high priority area for the Department, going back from the day of passage of the act.

I would have to suggest that the low numbers over the years is largely attributable to the clandestine nature of the trade, if you will. A lot of the transactions involved exchanges and close associations. It is not an open market as general adult pornography is, if you will. A lot of distributors tend to only deal with people they know. It is a very clandestine type of setting.

I would submit there is not lack of will that has anything to do with the numbers.

Mr. HUGHES. I think that the gentleman's question is a good one. And just to follow up on it, it is my own perception that wiretap authority is going to produce some, perhaps, marginal improvement in the arrest and prosecution rate—that removing commercial will improve somewhat. Eliminating the obscenity statute will improve it somewhat, but not very much, because we convicted on other sections. Obscenity hasn't, as I understand it, presented that much of an obstacle, although if it presents an obstacle in one case that is one too many.

I think what you have said in essence is that it is a very difficult area. It is difficult because of the clandestine nature to identify these criminals that are engaging in this type of activity.

Mr. RICHARD. We are in the process of reevaluating at the moment our current enforcement efforts on an interdepartmental basis just to see how we can enhance our current strategies and become more effective within this area.

The cases we do bring we are generally successful in convicting the defendants. I certainly agree with you, the numbers are not as great as we would like.

Mr. HUGHES. Case situations have come to our attention where the youngsters that were abused themselves get into other difficulties which go back to a period of time in our history where they were subjected to this type of abuse.

Have there been any followup of justifications for prosecutions?

Mr. RICHARD. We have no ability to even track that kind of information. I do know the literature suggests that these children who are abused grow up to have a variety of problems and no doubt you can anticipate they will encounter the prosecuting arm of the gov-

ernment at one level or another because of the variety of trauma that they experience during the course of their upbringing.

Mr. SHAW. Mr. Chairman, would you yield?

Mr. HUGHES. Yes, I would be happy to.

Mr. SHAW. On a related point, does the child who has been victimized—if he should come forward as a prosecution witness, would he enjoy any type of immunity from having his name or picture distributed as a rape victim would?

Mr. RICHARD. Probably not.

Mr. SHAW. Is that something that we ought to be thinking about? Would that be helpful in the prosecution if we were to attempt to give him some type of protection?

Mr. RICHARD. I do not think that at this point that is a problem, because our problem is just locating the minor. So I cannot say it is a problem encouraging the minor to testify.

Certainly we become less and less dependent on the child where we have wiretaps and so forth. I would not say that at this point we have enough empirical data to conclude that is a particular problem in this area.

Mr. SHAW. OK, thank you.

Mr. SMITH. Would the gentleman yield on that point as well?

Mr. HUGHES. The gentleman from Florida.

Mr. SMITH. Thank you. I tried for 3 years to pass a statute in my own State to allow for people who are under a disability, whether of age or of minor status, to be taken for purposes of testimony *in camera*, just with the judge, the prosecutor, the defense attorney, and the defendant, and then a video tape played thereafter for the jury in a closed courtroom so that they would not be hesitant, that you could get a prosecution from people who are otherwise scared out of their wits or sometimes so emotionally traumatized that they cannot testify at all.

It is almost impossible to get that, and that is one of the things that we would need, also.

I am also curious about the fact that with this clandestine activity, we tend to prosecute conspiracy cases now to a large degree. That is about as clandestine as you can get. I mean, not even the overt act has been performed and yet we seem to do that fairly well.

I would just urge you to go back and rethink this question as to whether or not you want to get, you know, further along in this. I do not know, just by the numbers alone, whether or not the priority you say it has been has really, in fact, been that much of a priority.

Mr. RICHARD. We are examining the very question you are raising.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. HUGHES. Well, we are back to resources again. We are spread so thin that we squeeze on one side of the balloon and the other side expands.

Mr. RICHARD. The Attorney General has sent out a directive——

Mr. HUGHES. It is a resource problem; there is no question about it. I am satisfied that in many of these areas, including child pornography, if we committed more resources, we could do a better job.

Mr. Richard, thank you. You have been helpful to us today and we appreciate it.

Our next witness is Charles P. Nelson, the Assistant Chief Postal Inspector for Criminal Investigation with the U.S. Postal Service.

Mr. Nelson has been in the Postal Service for some 19 years. He has conducted investigations and audits, a majority of which have primarily been in the criminal area. He served 10 years as a field inspector, basically in the southern California area, and has held duty assignments as assistant postal inspector in charge in the Seattle and San Francisco divisions, assistant regional chief postal inspector of the 13-State Southern region, and postal inspector in charge of the Cincinnati division.

In 1980, Mr. Nelson came to national headquarters to assume his current position of Assistant Chief Postal Inspector for Criminal Investigations. He has had a most distinguished career with the Postal Service.

We are pleased to have you today, Mr. Nelson. We have your statement, which, without objection, will be made a part of the record, and we hope that you can summarize for us.

TESTIMONY OF CHARLES P. NELSON, ASSISTANT CHIEF POSTAL INSPECTOR FOR CRIMINAL INVESTIGATION, U.S. POSTAL SERVICE, ACCOMPANIED BY WAYNE KIDD, MANAGER, FRAUD AND PROHIBITED MAILINGS BRANCH

Mr. NELSON. Thank you, Mr. Chairman.

With me today is Inspector Wayne Kidd. Inspector Kidd heads up our fraud and prohibited mailings branch.

We appreciate the opportunity to appear before the subcommittee and discuss our efforts in enforcing Federal laws prohibiting the mailing of child pornography.

The Postal Inspection Service has investigative jurisdiction over all violations of Federal criminal laws relating to the Postal Service, including the subject of this hearing, the mailing of pornography.

We have investigated obscenity offenses since 1865 when Congress first passed the Postal Obscenity Statute. Over recent years, prosecutions under the statute declined due to a series of Supreme Court decisions and due to American society in general growing more tolerant of pornographic material.

During that period of time, the distribution of obscene material depicting children was on the increase. The public was outraged by this type of material and Congress responded by enacting the Protection of Children Against Sexual Exploitation Act of 1977.

The Inspection Service acted immediately to give attention to the enforcement of this law. Child pornography investigations conducted since 1978 have resulted in the arrest of 97 offenders. Seventy-seven have been convicted, and court action for some of the others is currently pending. Twenty-five of those convicted have been sentenced to prison terms averaging 5.8 years.

Traffickers in child pornography have always maintained a low profile. However, since the enactment of the Protection of Children Against Sexual Exploitation Act, they have virtually gone underground. In order to gain access to distributors' networks, we moni-

tor publications oriented toward pedophiles and maintain close contact with local police and social workers who, in their work, frequently come upon child abuse and/or child pornography.

We also examine evidence, such as mailing lists seized during the execution of search warrants, in an effort to identify persons interested in this type of material.

As our jurisdiction is limited to postal-related offenses, our efforts are primarily directed to identifying those who sell, and/or distribute child pornography through the mails.

Investigations generally follow the pattern of identification, followed by test correspondence, followed by test purchases.

While the production and/or distribution of child pornography is potentially lucrative, we have seldom found it to be highly profitable when conducted through the mails.

Most often, our investigations have resulted in the identification of collectors, some of whom sell their material to others, while many do not. Those who do not sell the material, often loan or trade collections with others who share their interest.

Many of those identified held respected positions within their communities and had been able to conceal their interest in child pornography for years.

There have been professional dealers identified in our investigations, and also there have been clergymen, teachers, psychologists, journalists, and businessmen.

We have found that the bulk of child pornography traffic is noncommercial. This activity is not in violation of the Federal child exploitation statutes which require a commercial transaction in connection with the manufacture or distribution of the material.

In these noncommercial cases, we have been able to utilize the postal obscenity statute within Department of Justice guidelines.

Another alternative we have followed is to contact the appropriate State or local authorities to determine whether the evidence we have gathered supports a violation of local law.

This has been our most frequently exercised option in noncommercial cases as evidenced by the fact that during fiscal years 1980 through 1982, 53 of the 77 convictions arising out of our investigations were for State or local offenses.

That is a brief summary of our efforts to enforce the Federal laws prohibiting the mailing of child pornography. And at this time I would be happy to respond to questions.

[The statement of Mr. Nelson follows:]

STATEMENT OF CHARLES P. NELSON, ASSISTANT CHIEF POSTAL INSPECTOR FOR CRIMINAL INVESTIGATIONS

Mr. Chairman, I am Charles P. Nelson, Assistant Chief Postal Inspector, U.S. Postal Inspection Service. I appreciate the opportunity to appear before this subcommittee today to discuss our efforts to enforce Federal laws prohibiting the mailing of child pornography.

The Postal Inspection Service is the investigative arm of the United States Postal Service. It has investigative jurisdiction over all violations of Federal criminal laws relating to the Postal Service and is responsible for performing internal audits of the Postal Service and providing for the security of postal facilities and employees. Among the criminal acts investigated by postal inspectors are: Those acts involving an attack upon the Postal Service or its employees such as theft of mail, armed robberies, burglaries and assaults on postal employees: And secondly, those offenses involving the criminal misuse of the postal system for purposes such as the mailing of

bombs, the conduct of fraudulent schemes, and, of course, the subject of this hearing—the use of the mails to transport pornography.

Postal inspectors have investigated obscenity offenses since 1865 when Congress passed the postal obscenity statute. The majority of investigations conducted under this statute were directed at large commercial operations dealing primarily in obscene materials using adult models. For many years traffic in child pornography was limited in scope and was investigated in connection with other obscenity cases, especially cases involving large commercial dealers. Over the years, prosecutions under the postal obscenity statute declined due to a series of Supreme Court decisions and due to American society in general growing more tolerant of pornographic material. Unfortunately, during the period of greater tolerance, the distribution of obscene material depicting children was on the increase. The public was outraged by this type of material, and Congress responded by enacting the Protection of Children Against Sexual Exploitation Act of 1977 (title 18, U.S. Code, sections 2251-2253). The new statutes prohibit the manufacture or distribution for profit of material depicting children under 16 engaged in sexually explicit conduct.

The Postal Inspection Service immediately acted to give priority attention to the enforcement of the new law. At least three experienced postal inspectors in each of our five regions are designated as child pornography specialists. Additional investigative assistance is available to these specialists when needed. They have been provided training that includes instruction from noted experts in the child pornography field such as polite authorities and psychiatrists, as well as discussions with convicted pedophiles. The training process is conducted on a continuing basis to ensure that inspectors assigned to pornography investigations maintain and improve their expertise.

Child pornography investigations conducted by the Postal Inspection Service since 1978 have resulted in the arrest of ninety-seven offenders. Seventy-seven have been convicted, and court action for some of the ninety-seven individuals arrested is currently pending. We anticipate additional convictions once all court activity is completed. Twenty-five of those convicted have been sentenced to prison terms averaging 5.8 years.

Traffickers in child pornography have always maintained a low profile. However, since the enactment of the Protection of Children Against Sexual Exploitation Act of 1977, they have virtually gone underground. During adult obscenity investigations, we are often able to order materials directly from solicitations or advertisements but, with child pornographers, we must gain access to the distributors' underground networks. We monitor those publications oriented toward pedophiles, and we maintain close contact with local police and social workers who, in their work, frequently come upon child abuse and/or child pornography. We also examine evidence, such as mailing lists seized during the execution of search warrants, in an effort to identify persons interested in this type of material. Our efforts are primarily directed at identifying those who would sell child pornography through the mails. Our jurisdiction is limited to postal-related offenses, and investigations generally follow an identification, test correspondence, test purchase procedure. If, during the course of this procedure, we discover evidence of other offenses such as child abuse, we refer it to the proper authorities for attention.

While the production and/or distribution of child pornography is potentially lucrative, we have not found it to be highly profitable when conducted through the mails. Although we have investigated several commercial operations, they were relatively minor in scope compared to operations dealing in adult material and did not enjoy the financial success often achieved in the adult pornography business. Most often, our investigations have resulted in the identification of collectors, some of whom sell their material while others do not. Those who do not sell their material often loan or trade collections with others who share their interest.

Only rarely does the child pornography measure up to the sterotype image of the "dirty old man." Many of those displaying an interest held respected positions within their communities and have been able to conceal their interest in child pornography for years. There have been the professional dealers identified in our investigations, but there have also been clergymen, teachers, psychologists, journalists and businessmen.

We investigate the distribution of material of both domestic and foreign origin. Generally, the domestic material is of the "homemade" variety, while the imported material is produced by commercial dealers. We have also noted that once an item of child pornography beings to circulate, it is reproduced for further distribution, time and time again. As a result, a distributor may be many times removed from the origin of the material. While this and other factors complicate an investigation, we have made good progress in combating the use of the mails to distribute child

pornography. Many of the major domestic commercial mail order dealers have been identified and prosecuted; however, some child pornography is still being circulated through the mails by commercial dealers who have become extremely cautious and who try to restrict their sales to known pedophiles.

The bulk of the child pornography traffic is non-commercial. This activity is not in violation of the federal child pornography statutes. These statutes require a commercial transaction in connection with the manufacture or distribution of the material before a violation exists.

When confronted with a non-commercial situation, we have several alternatives. We may utilize the postal obscenity statute; however, the Department of Justice has been concerned that the potential number of non-commercial cases would be large and exceed the available Federal prosecution resources. Consequently, guidelines were established to identify those cases which should be acted upon. These guidelines are designed to offset any type of selective prosecution claims raised by defendants. These guidelines call for the Federal prosecution of child pornography offenders under title 18, United States Code, section 1461, when a combination of the following factors exist: more than three seizures over the past years; a large quantity of child pornography imported at one time; an arrest history of crimes against children; known membership in a family sex group; employment involving children; photographs depicting the recipient involved in sexual activity with children; correspondence with other pedophiles or undercover agents relating to sexual involvement with children; and, distribution of material. With these guidelines, only a handful of our non-commercial cases have been prosecuted federally.

Another alternative is to contact the approriate State or local authorities to determine whether the evidence we have gathered supports a violation of their laws. This has been our most frequently exercised option in non-commercial cases as is evidenced by the fact that during fiscal years 1980, 1981, and 1982, 53 of the 77 child pornography arrests arising out of our investigations were for State or local violations.

The Protection of Children Against Sexual Exploitation Act of 1977 applies to those who produce child pornography and/or those who transport it for sale or distribute it for sale. The act does not address the traders and lenders of child pornography, who we have found account for an appreciable number of those individuals involved in trafficking of child pornography. These individuals do not transport their material through the mails for the purpose of sale or distribution for sale and therefore do not violate the provisions of the statute.

Mr. Chairman, it has been my pleasure to report to you the efforts of the Postal Inspection Service to enforce Federal laws prohibiting the mailing of child pornography. I will be happy to answer any questions you may have.

Mr. HUGHES. Thank you very much, Mr. Nelson.

I get the impression from your testimony that you make few cases under the 1977 child pornography law because of the commercial requirement of that act.

Mr. NELSON. That's true. I think we resolve probably 30 to 35 percent of our investigations under the provision of this law.

Mr. HUGHES. Most of them are under the obscenity section?

Mr. NELSON. No; most of them are State and local.

Mr. HUGHES. I see.

Has the 1977 law really been a benefit or has it just been rather duplicative of previous authority?

Mr. NELSON. I would say a small benefit.

Mr. HUGHES. Marginal?

Mr. NELSON. Marginal, yes.

Mr. HUGHES. Removing the commercial requirements, I would assume, then, would be a major step forward?

Mr. NELSON. It would be a plus, definitely.

Mr. HUGHES. And removing the obscenity requirements for visual material would likewise, I would assume, be a step forward?

Mr. NELSON. Yes, I think it would be.

Mr. HUGHES. All right.

What type of cooperation do we have with foreign governments? Much of the material, as you have indicated, is commercially produced as opposed to domestic production which is handmade?

Mr. NELSON. We have extended some of our investigations into Europe and the Far East. We have had excellent cooperation from foreign law enforcement agencies. They are, I think, as anxious as we are to curtail the distribution of this material.

Mr. HUGHES. My perception is that we are absolutely loaded with child pornography in this country today. Is my perception correct?

Mr. NELSON. Depending on loaded, I would agree. I guess there are a lot of——

Mr. HUGHES. Each year seems to have brought more of this stuff to the market.

Mr. NELSON. I would concur with that. We have at this point, I think, about 60 to 65 current investigations going on.

Mr. HUGHES. How many investigators do we have working on this?

Mr. NELSON. We don't have a definitive number. We have at least probably 20 to 25 specialists who work on pornography cases but they are also aided, if the workload is there, by any of the other 2,000 inspectors.

Mr. HUGHES. Not just child pornography, it is all types of pornography, I assume?

Mr. NELSON. That's right.

Mr. HUGHES. How does that compare with the force level, let's say, 3 years ago?

Mr. NELSON. Mr. Kidd reminds me that we started out in 1978 with no specialists in this area. We were working pornography at that time but they lacked a lot of the training we have given them since then.

Mr. HUGHES. How many were assigned at that period of time to this work, even though they might not have been designated as specialists?

I am trying to find out, you know, whether we are committing more resources, committing less resources, staying about the same as the volume of this stuff increases; that's what I am trying to find out.

Mr. NELSON. In 1978, we had 17 individuals assigned.

Mr. HUGHES. So we have put on maybe three or four more?

Mr. NELSON. I would say probably eight more fulltime.

Mr. HUGHES. I see. How much has the material increased in volume since 1978? Just your best estimate.

Mr. NELSON. Twenty percent, twenty-five percent. That is an estimate. I would have to look at all of our complaints and statistics from the investigations to really give you a definitive answer.

Mr. HUGHES. Do you have to prioritize the investigations because of your inability to get to all the leads?

Mr. NELSON. Child pornography investigations are category 1 with us. We prioritize investigations in three categories: 1, 2, and 3. One being the highest category, and child pornography is in that category.

Mr. HUGHES. What is the delay between when you get some active lead to the time that an investigator is able to begin to

follow up on it, with a test letter, or with contacts, or other avenues of investigation?

Mr. NELSON. It depends, of course, upon the offender. We may detect an ad in some magazine and write to that individual and get a prompt response within 1 or 2 weeks, with some photographs. Or it may be somebody who is a great deal more suspicious than the first one I mentioned and we may have to carry on correspondence for 1 month before we obtain anything.

Mr. HUGHES. Many of the ads are rather ambiguous. You are not sure just exactly what they are inviting. How do you handle those? I mean, with the limited resources you have, you obviously have to determine which ones you are going to pursue.

Mr. NELSON. I think we pursue all of them that give us any indication that child pornography or exploitation of children is involved, and there are a lot of them. Many of them we don't get responses to.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. I appreciate your statement. I have no questions at this time. Thank you.

Mr. HUGHES. The gentleman from Florida, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I am curious as to whether or not the statistics you gave were—and I think you were here during the course of Mr. Richard's presentation—independent of what the Justice Department is doing. Is that correct?

Mr. NELSON. Partially. I think the Justice Department statistics were solely Federal prosecutions. Mine involved Federal and State.

Mr. SMITH. In other words, when you undertake an active investigation, if it turns out that you can't or won't make a Federal prosecution out of it, you turn it over to the local or State authorities for prosecution?

Mr. NELSON. We present it to the local authorities, yes.

Mr. SMITH. I mean, you give them what you have and then they can move if they wish?

Mr. NELSON. We work right with them. If there is more investigation required, we participate in it.

Mr. SMITH. Let me ask you if you can make, if you even want to, a correlation between the amount of people you have working on this and the efforts you put in as opposed to the ultimate product that is turned out by your agency in terms of prosecutions or investigations.

Do you feel that your personnel costs and the manpower that you expend on it are valuable in relation to what comes out at the end of the pipe?

Mr. NELSON. Absolutely. If, for nothing else, the public relations and the ability to go out and discuss these things and portray what we can to help this problem.

Mr. SMITH. One final question. Do you have any difficulty in when you make a case, you generally turn it over to the Justice Department, don't you? I mean, you don't prosecute yourself?

Mr. NELSON. No, we turn it over to the Justice Department or the State prosecutor.

Mr. SMITH. Do you have good cooperation with the Justice Department on the cases that you try to make?

Mr. NELSON. Yes.

Mr. SMITH. Has there been any problem with it?

Mr. NELSON. No, no. If it adheres to their guidelines, there has been no difficulty.

Mr. SMITH. Do you have a problem with their guidelines?

Mr. NELSON. Not really. I think their guidelines are designed to prevent a great influx of cases for prosecution, so they have been selective. I don't have a problem with it because we are successful in the State courts.

Mr. SMITH. Have they backed you up at all? Have you gotten things to them which don't come on line in terms of indictment or prosecution for a while?

Mr. NELSON. Not in child pornography, no.

Mr. SMITH. Thank you. I have no more questions.

Mr. HUGHES. The gentleman from Florida, Mr. Shaw.

Mr. SHAW. No questions. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you very much. We appreciate your testimony, Mr. Nelson.

Mr. HUGHES. Our final witness of the day is Mr. Robert P. Schaffer, the Assistant Commissioner for Operations of the U.S. Customs Service.

Mr. Schaffer, we are delighted to have you with us today. We have your statement which, without objection, will be made a part of the record, and we appreciate your patience.

TESTIMONY OF ROBERT P. SCHAFFER, ASSISTANT COMMISSIONER (OPERATIONS), U.S. CUSTOMS SERVICE, ACCOMPANIED BY RICHARD ABBEY, CHIEF COUNSEL, U.S. CUSTOMS SERVICE

Mr. SCHAFFER. Thank you, Mr. Chairman, and members of the subcommittee. I will make some brief remarks and certainly be responsive to any questions you may have.

I would like to thank you, first, for inviting me here today. I came to speak on behalf of Commissioner von Raab, who is attending a meeting of the Customs Cooperation Council in Brussels this week; but I would like to express his concern, and that of all of us at U.S. Customs, with the issue of pornography—not just child pornography—but pornography, period.

Commissioner von Raab recently spoke at a White House meeting on obscenity in which he addressed a number of recommendations put forth by the attendees, the Coalition of Anti-Pornography leaders.

He talked about the decline in Customs pornography seizures from 15,000 in 1975 to 1,500 in 1980. We are still trying to determine the cause of this decline, but we are preparing to reverse that trend.

For example, during April, we added 12 mail specialists to our facilities at J.F.K. and Newark, for the express purpose of intercepting pornography entering the country in the mails. They are supplementing the mail specialists already there.

Just since the last week of April, these specialists screened a total of approximately 366,000 packages; of these, some 13,600 were opened, 302 contained pornographic materials that were referred to the U.S. attorney.

We are taking a number of steps to increase the enforcement of our Nation's obscenity laws.

First, we have recommended the formation of a working group between the Postal Service, the Justice Department, and the Customs Service to reopen the dialog which seems to have waned on this issue. No one of us alone can be effective—there must be an open and unified commitment.

Second, we have instituted a series of mail blitzes, targeting pornography source countries. This, hopefully, will send a clear message to pornography distributors and help to redevelop an intelligence data base on habitual violators of our obscenity laws.

Third, where Customs has a role in the U.S. Attorney Law Enforcement Coordinating Committees, we will support including pornography enforcement as a high priority. We believe this will help to emphasize to law enforcement in general, especially at the local level, that the Federal Government is serious about enforcing these laws, and it will help to provide closer coordination with local police department juvenile units.

Lastly, Customs would support the development of a unified enforcement strategy that seeks to identify and investigate the top pornography importers in the United States.

Turning to the bills being considered by this subcommittee, I can tell you that they will further help Customs efforts to interdict obscene material.

The bills to amend 18 U.S.C. 2252 by deleting the commercial purpose limitation can only have a positive effect on Customs enforcement efforts.

Currently, prosecution under this section is limited to cases involving the sale or distribution for sale of pornographic materials involving children. This has proven to be a major hurdle in Customs referrals for criminal prosecution to U.S. attorneys nationwide.

Removal of the commercial purpose requirement would not only remove this obstacle, but would also cover trade or exchange situations, a growing method of distribution.

We note that there are a number of other legislative proposals to strengthen the child pornography laws, the most comprehensive, in our opinion, being H.R. 2151, the proposed Comprehensive Crime Control Act of 1983.

Title 15, part B, addresses child pornography with amendments which we feel will strengthen our ability to enforce the laws against this despicable trade.

We cannot promise you that our efforts will be as successful or as extensive as you or we would ideally like. But we can promise you that we will go about our task with vigor and we believe that we can achieve more positive results than those we have seen in the recent past.

I would be very happy to answer any specific questions. I am also accompanied by Mr. Richard Abbey, our chief counsel.

[The statement of Mr. Schaffer follows:]

U.S. CUSTOMS SERVICE
STATEMENT OF ROBERT P. SCHAFFER
ASSISTANT COMMISSIONER (OPERATIONS)
U.S. CUSTOMS SERVICE
HEARING BEFORE SUBCOMMITTEE ON
CRIME OF THE HOUSE COMMITTEE ON THE JUDICIARY
THURSDAY, JUNE 17, 1983

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, THANK YOU FOR INVITING ME HERE TODAY. I CAME TO SPEAK ON BEHALF OF COMMISSIONER VON RAAB, WHO IS ATTENDING A MEETING OF THE CUSTOMS COOPERATION COUNCIL IN BRUSSELS THIS WEEK; BUT I EXPRESS HIS CONCERN, AND THAT OF ALL OF US AT U. . CUSTOMS, WITH THE ISSUE OF PORNOGRAPHY - NOT JUST CHILD PORNOGRAPHY - BUT PORNOGRAPHY PERIOD.

COMMISSIONER VON RAAB RECENTLY SPOKE AT A WHITE HOUSE MEETING ON OBSCENITY IN WHICH HE ADDRESSED A NUMBER OF RECOMMENDATIONS PUT FORTH BY THE ATTENDEES, THE COALITION OF ANTI-PORNOGRAPHY LEADERS.

HE TALKED ABOUT THE DECLINE IN CUSTOMS PORNOGRAPHY SEIZURES FROM 15,000 IN 1975 TO 1,500 IN 1980. WE ARE STILL TRYING TO DETERMINE THE CAUSE OF THIS DECLINE, BUT WE ARE PREPARING TO REVERSE THAT TREND.

THOSE ATTENDING THE WHITE HOUSE MEETING MADE A NUMBER OF SPECIFIC RECOMMENDATIONS. THEY RECOMMEDED THAT CUSTOMS REACTIVATE A UNIT IN NEW YORK THAT HAD BEEN INVOLVED IN THIS EFFORT.

WE CERTAINLY AGREE WITH THE PURPOSE OF THIS RECOMMENDATION BUT FEEL THAT IT CAN BE ACCOMPLISHED IN A NON-BUREAUCRATIC MANNER.

THAT UNIT IT WAS DETERMINED REPRESENTED AN UNNECESSARY LEVEL OF BUREAUCRACY. IT WAS ONE MORE STOP FOR PAPERWORK TO MAKE BEFORE BEING REFERRED TO THE U.S. ATTORNEY. IN FACT, THE STATISTICS DII NOT BEAR OUT THAT THIS WAS A SUCCESSFUL ORGANIZATION.

THEY PROPOSED CERTAIN MODIFICATIONS TO CUSTOMS FORMS AND PROCEDURES CONCERNING REFERRAL OF SEIZED MATERIAL TO THE U.S. ATTORNEY'S OFFICE -- A CHANGE DESIGNED TO PROVIDE SUFFICIENT TIME TO PREPARE A CASE FOR FORFEITURE.

AND THEY PROPOSED ALSO THAT A "WAIVER OF SCREENING" FORM BE MODIFIED TO ASK SPECIFIC QUESTIONS ABOUT THE CONTENT OF A FILM. WE HAVE AGREED WITH BOTH SUGGESTIONS AND CHANGES ARE BEING MADE. THE GROUP ALSO CALLED FOR ORDERLY RECORDKEEPING OF THESE FORMS. THIS TOO IS BEING REVIEWED.

In addition, they called for the appointment of at least one Customs official in every port who is an expert on obscenity laws and regulations. This suggestion is a good one and we are going to implement it at those ports which pose the greatest threats.

They also asked that annual reports be furnished to Customs headquarters and for full accountability of the actions of the officers in the field. We agree that a greater level of review must be undertaken, and we will explore ways to implement this suggestion or some equally stringent plan.

Finally, they called for a reemphasis to field personnel, of Customs' role with regard to letter-class mail, and a reordering of shifts for mail "inspectors." Customs mail specialists are charged with the responsibility to seize pornographic material at the border; however, a Customs officer may not open a piece of letter-class mail without a Postal employee present. This is to ensure that we adhere to the standards recognized by the Ramsey case.

During April we added 12 mail specialists to our facilities at JFK and Newark for the express purpose of intercepting pornography entering the country in the mails. They are

SUPPLEMENTING THE MAIL SPECIALISTS ALREADY THERE. OUR AIM IS TO PLUG ANY GAP IN OUR INSPECTION OF INTERNATIONAL MAIL.

JUST SINCE THE LAST WEEK OF APRIL THESE SPECIALISTS SCREENED A TOTAL OF 366,401 PACKAGES. OF THESE, SOME 13,600 WERE OPENED. THREE-HUNDRED AND TWO CONTAINED PORNOGRAPHIC MATERIALS THAT WERE REFERRED TO THE U.S. ATTORNEY.

I MIGHT ADD THAT THE VALUE OF HAVING MAIL INSPECTORS WAS DEMONSTRATED IN ANOTHER OF OUR ENFORCEMENT AREAS A FEW WEEKS BACK WHEN A MAIL INSPECTOR IN OAKLAND, CALIFORNIA, DISCOVERED 80 POUNDS OF SOUTHEAST ASIAN HEROIN ENTERING THE COUNTRY IN THE MAILS. THIS SEIZURE LED TO THE ARREST OF TWO CONSPIRATORS IN LOS ANGELES.

SO IN CONCLUSION, WE ARE TAKING A NUMBER OF STEPS TO INCREASE THE ENFORCEMENT OF OUR NATIONS OBSCENITY LAWS.

FIRST, WE HAVE RECOMMENDED THE FORMATION OF A WORKING GROUP BETWEEN THE POSTAL SERVICE, THE JUSTICE DEPARTMENT, AND THE CUSTOMS SERVICE TO REOPEN THE DIALOGUE WHICH SEEMS TO HAVE WANED ON THIS ISSUE. NO ONE OF US ALONE CAN BE EFFECTIVE -- THERE MUST BE AN OPEN AND UNIFIED COMMITMENT.

SECOND, WE HAVE INSTITUTED A SERIES OF MAIL BLITZES, TARGETING PORNOGRAPHY SOURCE COUNTRIES. THIS HOPEFULLY WILL SEND A CLEAR MESSAGE TO PORNOGRAPHY DISTRIBUTORS AND HELP TO REDEVELOP AN INTELLIGENCE DATA BASE ON HABITUAL VIOLATORS OF OUR OBSCENITY LAWS.

THIRD, WHERE CUSTOMS HAS A ROLE IN THE U.S. ATTORNEY LAW ENFORCEMENT COORDINATING COMMITTEES, WE WILL SUPPORT INCLUDING PORNOGRAPHY ENFORCEMENT AS A HIGH PRIORITY. THIS WILL HELP TO EMPHASIZE TO LAW ENFORCEMENT IN GENERAL, ESPECIALLY AT THE LOCAL LEVEL, THAT THE FEDERAL GOVERNMENT IS SERIOUS ABOUT ENFORCING THESE LAWS, AND IT WILL HELP TO PROVIDE CLOSER COORDINATION WITH LOCAL POLICE DEPARTMENT JUVENILE UNITS. BESIDES PROVIDING STRONGER ENFORCEMENT OF OUR OBSCENITY LAWS, THE INFORMATION GAINED BY LOCAL POLICE WILL HELP TO BETTER IDENTIFY POSSIBLE SEX OFFENDERS AND CHILD MOLESTERS AS WELL.

LASTLY, CUSTOMS WOULD SUPPORT THE DEVELOPMENT OF A UNIFIED ENFORCEMENT STRATEGY THAT SEEKS TO IDENTIFY AND INVESTIGATE THE TOP PORNOGRAPHY IMPORTERS IN THE UNITED STATES.

TURNING TO THE BILLS BEING CONSIDERED BY THIS SUBCOMMITTEE, I CAN TELL YOU THAT THEY WILL FURTHER HELP CUSTOMS EFFORTS TO INTERDICT OBSCENE MATERIAL. I WOULD LIKE TO COMMENT ON JUST TWO.

THE BILL TO AMEND 18 U.S.C. 2252 BY DELETING THE COMMERCIAL PURPOSE LIMITATION CAN ONLY HAVE A POSITIVE EFFECT ON CUSTOMS ENFORCEMENT EFFORTS. CURRENTLY PROSECUTION UNDER THIS SECTION IS LIMITED TO CASES INVOLVING THE SALE OR DISTRIBUTION FOR SALE OF PORNOGRAPHIC MATERIALS INVOLVING CHILDREN. THIS HAS PROVEN TO BE A MAJOR HURDLE IN CUSTOMS REFERRALS FOR CRIMINAL PROSECUTION TO U.S. ATTORNEY'S NATIONWIDE. REMOVAL OF THE COMMERCIAL PURPOSE REQUIREMENT WOULD NOT ONLY REMOVE THE OBSTACLE, BUT WOULD ALSO COVER TRADE OR EXCHANGE SITUATIONS, A GROWING METHOD OF DISTRIBUTION. WE NOTE THAT THERE ARE A NUMBER OF LEGISLATIVE PROPOSALS TO STRENGTHEN THE CHILD PORNOGRAPHY LAWS, THE MOST COMPREHENSIVE IN OUR OPINION BEING H.R. 2151, THE PROPOSED COMPREHENSIVE CRIME CONTROL ACT OF 1983. TITLE 15, PART B, ADDRESSES CHILD PORNOGRAPHY WITH AMENDMENTS WHICH WE FEEL WILL STRENGTHEN OUR ABILITY TO ENFORCE THE LAWS AGAINST THIS DESPICABLE TRADE.

WE CANNOT PROMISE YOU THAT OUR EFFORTS WILL BE AS SUCCESSFUL OR AS EXTENSIVE AS YOU OR WE WOULD IDEALLY LIKE FOR THEM TO BE. BUT WE CAN PROMISE YOU THAT WE WILL GO ABOUT OUR TASK WITH VIGOR AND WE BELIEVE THAT WE CAN ACHIEVE MORE POSITIVE RESULTS THAN THOSE WE HAVE SEEN IN THE RECENT PAST.

Mr. HUGHES. Thank you, Mr. Schaffer.

Mr. SCHAFFER. Thank you, Mr. Chairman.

Mr. HUGHES. Have you read the Sawyer bill?

Mr. SCHAFFER. No, I haven't.

Mr. HUGHES. I would invite you to do that, or my legislation, the one I introduced which I think also is comprehensive.

H.R. 2151, the omnibus crime bill, that we hear so much about, is a bill going nowhere. We can't pass omnibus crime bills on this side. We have got to talk in terms of moving individual legislation or else we are not going to have any legislation.

Mr. SCHAFFER. We would certainly support any movement of any bill that would help.

Mr. HUGHES. The Judiciary Committee is holding H.R. 2151 at the full committee and I suspect that is where it is going to stay.

In any event, in your testimony you state that a Customs officer may not open letter class mail without a Postal employee being present. Was this actually required by the *Ramsey* case, can you tell me?

Mr. ABBEY. Mr. Chairman, this was not specifically required by the *Ramsey* case.

Mr. HUGHES. What is the rationale?

Mr. ABBEY. The *Ramsey* case set out, first to affirm the authority of the Customs Service to open sealed letter class mail. Then it set out some guidelines. Pursuant to the *Ramsey* case, the Customs Service and the Postal Service entered into discussions that Postal Service had some concern about the opening of sealed letter class mail and it was the result of a mutual agreement between the two Services that required a postal inspector to be present.

In fact, currently we are drafting a letter to the Postmaster General to modify that agreement so that a sealed letter class mail can be opened in the presence of two Customs officers rather than to have somebody from the Postal Service.

Mr. HUGHES. That's a step in the right direction. It seems to me it doesn't make sense to require a postal inspector to come in while another Federal employee, staff of Customs, opens up first class mail.

Mr. ABBEY. We agree.

Mr. HUGHES. I don't know what it cost to do that but you are talking about literally tens of thousands of pieces of mail that you inspect, you are talking about a lot of money.

I am happy to hear that some letter is being drafted.

I wonder if you would share that with the committee when that is drafted and sent to the Postal Service so possibly we can take a position on it ourselves?

Mr. ABBEY. Absolutely.

[The information to be furnished follows:]

THE POSTMASTER GENERAL
Washington, DC 20260

March 21, 1978

Honorable Robert E. Chasen
Commissioner of Customs
Washington, D. C. 20229

Dear Bob,

In response to your letter of March 9, 1978, I am enclosing two copies of the final agreement between the U. S. Postal Service and the Customs Service which requires letter class mail to be opened for Customs examination only in the presence of a responsible postal employee. I have affixed my signature to the document on behalf of the Postal Service.

I concur with your suggestion that our two Services should enter this agreement with a prior understanding that for the intent and purpose of Section I of the agreement, existing Customs Mail Centers are immediately jointly designated facilities wherein sealed letter class mail may be opened and its contents examined. Therefore, please accept this letter as formal notification that the U. S. Postal Service executes this agreement with such an understanding.

Upon return of a signed copy of the agreement, I will make arrangements for a representative of the Postal Service to confer with your staff for the purpose of promptly initiating the revised procedure.

Your kind remarks with respect to my appointment as Postmaster General are deeply appreciated.

Sincerely,

W. F. Bolger

Enclosure

I appoint the Postal Corporation gentleman personally extended. Bill

Agreement

Since existing administrative procedures for the customs clearance of sealed letter class mail entering the Customs Territory of the United States include two rules particularly designed to safeguard the privacy of correspondence, namely, that (1) no such mail shall be opened by the Customs Service if it appears to contain only correspondence and, (2) no Customs officer or employee shall read any correspondence found inside such mail, or allow anyone to do so, except under a search warrant authorized by law; and public confidence that these procedures are being followed may be enhanced by providing for the independent observation of customs sealed letter class mail opening and examination by a responsible postal employee; therefore, the United States Postal and Customs Services agree through their undersigned representatives as follows:

I. The Place That Sealed Letter Class Mail May Be Opened And Its Contents Examined. No sealed letter class mail item may be opened, nor may its contents be examined, except in a facility jointly designated by the Postal and Customs Services for that purpose. Nothing in this section shall be construed to preclude either the lawful seizure of any sealed letter class mail item or some or all of the contents thereof (with or without a search and seizure warrant, as provided by law), or the lawful removal from the designated facility of such an item or its contents, or its opening, examination, treatment and disposition in accordance with law, after it has been lawfully seized.

II. Observation Of Opening. No officer or employee of the Customs Service shall open sealed letter class mail addressed for delivery within the Customs Territory of the United States, which originated outside of it, unless a responsible postal employee is present to observe the opening. The Postal Service, upon receiving notice from the Customs Service that sealed letter class mail is to be opened, shall make a responsible postal employee available to observe such openings without undue delay.

III. Examination Procedures. After sealed letter class mail has been opened no officer or employee of the Customs Service shall examine the contents of sealed letter class mail, unless a responsible postal employee is present to observe the examination, or measures are taken to prevent the contents of the mail item which appear to be correspondence from being exposed to view.

IV. Definitions. For the purposes of this agreement:

A. The Customs Territory of the United States consists of the 50 States, the District of Columbia, and Puerto Rico.

B. A responsible postal employee is the employee designated by the Postal Service to observe the opening of sealed letter class mail, and the examination of its contents, and to report any failures to follow the proper procedures with respect to such openings and examinations.

V. Joint Implementing Regulations. The Postal and Customs Services with each other's consent shall issue, amend, and maintain in effect any regulations necessary to implement this agreement.

VI Delegations Authorized. Either the Postal Service or the Customs Service may delegate any of the responsibilities vested in itself by this agreement to any of its subordinate officials, including the heads of different field units, so long as each delegation shall be in writing and reasonably available to inspection by the personnel of the other agency for official purposes upon request.

VII. Relationship Of Agreement To Existing Regulations, Agreements, And Procedures. This agreement is intended to supplement and be generally consistent with existing regulations, agreements, and administrative procedures. No action or inaction is authorized by this agreement's failure to prohibit such action or inaction specifically. No action or inaction is prohibited by reason of this agreement's failure to provide specifically for it.

VIII. Field Office Procedures. Field customs and postal installations may agree to any details of administration (such as the joint designation of the hours in which mail may be opened and examined in the presence of a responsible postal employee) which are not otherwise provided for, not inconsistent with this agreement, and not inconsistent with the requirements of any applicable laws or regulations.

IX. Effective Dates. This agreement shall become effective immediately after its execution by an authorized representative of each agency. The procedures required by this agreement shall be initiated as soon as practicable on such date or dates as may thereafter be jointly agreed.

For the U. S. Postal Service:

William J. Bolger
(name)

Postmaster General
(title)

March 21, 1978
(date)

For the U. S. Customs Service:

R. E. Chasen
(name)

Commissioner of Customs
(title)

MARCH 22, 1978
(date)

MAI-13 CC:FIA
FO-81-6-23

JUL 1 1982

Mr. Postmaster General:

Subject: Opening of sealed letter class mail in presence of a Postal Employee

By agreement of March 22, 1978, the Postal Service and Customs Service agreed that "No officer or employee of the Customs Service shall open sealed letter class mail addressed for delivery within the United States, which originated outside of it, unless a responsible postal employee is present to observe the opening. The Postal Service, upon receiving notice from the Customs Service that letter class mail is to be opened shall make a responsible postal employee available to observe such openings without undue delay."

Pursuant to that agreement, Customs published an appendix to 19 CFR, Part 145, indicating that mail opening of the type described above would be in the presence of a postal employee. The Postal Service also published a similar statement in the International Mail Manual, Section 821.1, incorporated by reference into 39 CFR 10.1.

After five years experience with the implementation of this agreement, Customs believes that there is no longer a need for postal supervision of mail opening by Customs employees. No significant incidents of Customs employees failing to comply with the requirements for opening mail without a warrant have occurred during the five years of postal oversight. However, such a change in procedure would expedite handling of the mail. It is our understanding that presently delays in examination of first class mail are being experienced because of the necessity of waiting for the availability of a postal employee. It is Customs' opinion that the maintenance of the mail opening procedure could be adequately insured by the presence of a Customs observer, i.e., a second Customs employee, being present at the opening of sealed letter class mail, recording his observations, and reporting any problems to the Customs supervisor. Of [illegible] would result in the

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Therefore, Customs seeks the cooperation of the Postal Service in amending the regulations and the agreement between the parties to delete this requirement. Please send us your comments at your earliest convenience.

Yours faithfully,

[illegible], Jr.

The Honorable
William F. Bolger
Postmaster General
Washington, D.C. 20260

Acting Commissioner of Customs

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THE POSTMASTER GENERAL
Washington, DC 20260-0010

July 14, 1983

Dear Mr. Corcoran:

This will acknowledge your letter of June 27, 1983, asking for comments on a proposed change in the agreement of March 22, 1978, between the Postal Service and the Customs Service, concerning the procedures for Customs' openings of incoming letter mail which is sealed against inspection.

Any proposed change in mail opening procedures involves a potentially sensitive subject, and a number of postal staff groups will need to give careful consideration to the policy and operational implications of any proposal. It will facilitate our review if you would designate a contact person in your organization with whom our staff could communicate informally concerning the details of the proposal.

Sincerely,

William F. Bolger

Mr. George C. Corcoran, Jr.
Acting Commissioner of Customs
U. S. Customs Service
1301 Constitution Avenue, N.W.
Washington, D.C. 20229-0001

RECEIVED
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CUSTOMS
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THE COMMISSIONER OF CUSTOMS

WASHINGTON, D.C.

SEP 7 1983

MA1-13 CC:EBA
EO-83-06-25

Dear Mr. Postmaster General:

Re: Opening of Sealed Letter Class Mail in Presence of a Postal Employee

This is in response to the request, in your letter of July 14, 1983, for a contact point for informal discussions of the proposal to change the agreement of March 22, 1978, to provide for opening of sealed letter class mail without the presence of a postal employee. Ms. Elizabeth Anderson, Office of Chief Counsel, 566-6245 is coordinating Customs activities regarding the proposed change. Please feel free to have your staff contact her directly.

Yours faithfully,

Acting Commissioner of Customs

The Honorable
William F. Bolger
Postmaster General
Washington, D.C. 20260

AVAILABLE

Mr. HUGHES. You recommend the development of a unified law enforcement strategy to identify top pornography importers. What do you recommend to be the elements of that particular strategy?

Mr. SCHAFFER. I don't know that we are certain what the elements would be because we are trying to get a coordinated effort by working with the other agencies that are involved.

Mr. HUGHES. Do we have a strategy now?

Mr. SCHAFFER. I would say it is a loose strategy, at best, right now because we have not formulated a coordinated and cohesive effort. Currently we are working with the other agencies involved but I don't believe we have a fully integrated strategy.

Mr. HUGHES. Can you give us the elements of the so-called loose strategy?

Mr. SCHAFFER. Right now we target certain source countries that have been the source for some of these materials, certain pornography materials coming into the country in the past.

At that point we request the Postal Service to provide to us that specific mail for screening. Our mail specialists go through not only parcels but letter class mail. So in that regard our strategy would be to selectively cull through the millions of documents and millions of letters and parcels that are received in this country each year, to target those that are coming from source countries. At that point then we would pursue any screening efforts jointly with the Postal authorities.

Mr. HUGHES. Thank you. I want to thank you for your statement.

I only have one constructive suggestion to make.

I think that you will find subcommittees generally move pieces of legislation that members of the subcommittee have introduced and in the future you might be well-advised to address yourself in your testimony before this subcommittee to those bills that are pending before this subcommittee.

The gentleman from Michigan.

Mr. SAWYER. Just to amplify a little bit the comments of the chairman, we have some seven subcommittees of Judiciary, for example, and among three of them that occur to me right away is this Crime Subcommittee. There is also a Subcommittee on Criminal Justice and a Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and four more.

What you would normally have in an omnibus bill, parts of it will go, if it is split up, would go to at least three of those subcommittees, and probably some parts would go to others. For example, all sentencing and things such as the insanity defense would go to Criminal Justice. Bail reform and the exclusionary rule would go to Courts and Civil Liberties.

So when you put in an omnibus bill it just kind of sits in the middle and it doesn't go anywhere. I don't know why they do that. The Senate has different internal procedural rules so they can handle an omnibus bill. It just totally thwarts things here in the House. Then when the Senate bill comes over, the argument then occurs that we have never had any hearings on any of these things. Therefore, some of importance, there is some reluctance of Members to support the ones that they have had no hearings themselves on at all, and just total reliance on what the Senate has done.

Mr. HUGHES. Would the gentleman yield?

Mr. SAWYER. Yes.

Mr. HUGHES. There is another very practical impact. You folks have wanted, and I think rightfully so, administrative forfeiture modifications, which we got for you. That has been some 8 months ago. We needed that yesterday, to help you in southern Florida, with the long forfeiture process. I want to tell you it is going to be difficult to get that again. So that is what happens. You get a lot of good provisions, like the forfeiture provisions, in an omnibus bill, and it all goes down the drain when somebody tacks on some amendment on the Senate side.

Mr. SCHAFFER. Mr. Chairman, let me just clarify. I don't want to denigrate, certainly, any of the initiatives that are pending. My remarks were meant to capture perhaps the full nature of the omnibus bill and certainly I recognize some of the constraints and problems that are associated with it.

Certainly our agency would support any initiative that would help us cope with the problem.

Mr. HUGHES. You ought to take a look at the Sawyer bill. It is exciting.

Mr. SCHAFFER. I certainly shall.

Mr. SAWYER. In the last Congress, again amplifying the chairman's comment, we worked very, very hard in the lameduck session to finally get an omnibus bill through that came out of the Senate. They have no germaneness limitation and they tacked the whole omnibus bill onto a small bill of ours but we managed to get it through, and get it through conference; sent it down and, whereupon, because one of the about eight bills that it included didn't appeal to Justice, they pocket vetoed the bill—the whole bill.

It had all the other provisions they wanted as badly as we did. So it is very frustrating to fool with these omnibus bills because of that. A bill that they vetoed it on, they called the drug czar bill, whatever you call it, drug coordinator bill, was one that just got tacked on, among others, over in the Senate, that we had never seen in the House. That brought down the whole bill with a pocket veto.

I don't know why they persist in going these omnibus bill routes because that is a kind of general fate they meet when you get into something as controversial as criminal laws. If you pass seven out of eight of them, you are doing pretty good. But if they then add on the eighth one to the other seven, you lose them all because they can't line item a veto, they veto the whole bill.

What about the new current budget projections for fiscal year 1984, will they help or hinder your efforts along the lines we are talking about?

Mr. SCHAFFER. As I indicated, we have already begun moving our resources into this area. There had been a shift in recent years of some resources out of the program. We are in the process of restoring positions to that program right now. So with or without a change in the budget, the 1984 budget, at least as I understand it, any reduction won't harm us at this point. We will be adding personnel into this area.

Mr. HUGHES. The gentleman from Florida, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I find that your answer to the last question a little bit confusing. I sit on the Immigration and Refugees Subcommittee which handles the authorization bill for the INS. You are talking about 2,000 positions and Customs 2,000 positions requested that be cut from last year to this year.

I don't understand how Customs thinks they could operate effectively with 2,000 less personnel.

Mr. SCHAFFER. I didn't know whether to open up the dialog of the proposed budget which did include a 2,000-man reduction——

Mr. SMITH. What manpower do you need to utilize——

Mr. SCHAFFER. What I am suggesting to you today, however, is with or without that budget reduction if, in fact, it is ever enacted, the Customs Service is moving resources today into this area from within its existing resources. And the positions, as I indicated, in the New York area, are already in place and they are already moving into California as well.

So we are prepared to move resources from other areas of our involvement and other activities that we have into this area because of our concerns and sensitivities.

Mr. SMITH. One final question now.

Mr. SCHAFFER. Sure.

Mr. SMITH. I should have asked the gentleman from the Postal Service, but I ask you because I think it may have some relevance. I mentioned the fact that I thought organized crime was very strongly involved in the process of child pornography and having the Customs Service which generally tends to deal with what is coming in from overseas.

Have you found any link in organized—and organized crime is no longer just the traditional, there is organized crime from Canada and from South America and from the Far East.

Have you noticed any ties to what you would consider to be an organized unit?

Mr. SCHAFFER. Congressman, I don't have any specific information on that issue with me today but I would certainly be willing to provide any to this committee when we get back and are able to research it. I am not aware of any, no.

Mr. SMITH. Then the corollary is, you mean most of this stuff that is coming in is really just from independent people, that there is no network of organized, at least coordinated, effort?

Mr. SCHAFFER. Again, I just can't answer the question. I am not at all certain the extent to which organized crime is involved. I will certainly provide you with that information if it is available.

[The information to be furnished follows:]

To date, no Customs evidence has been developed that known organized crime elements utilizing international networks have been involved in smuggling pornography of any type into the United States.

Mr. SMITH. I would be curious if you would at least provide us with the details of the number of times the same names, repetitive names, pop up on your——

Mr. SCHAFFER. I said our concern has been basically centered on the source countries and not identifying specific individuals. And as the individuals become known, then we target them as well.

Mr. SMITH. Thank you very much.

Mr. HUGHES. The gentleman from Florida, Mr. Shaw.

Mr. SMITH. He left.

Mr. HUGHES. The ranking member and myself were just discussing the 2,000 billet cut.

Mr. SAWYER. I understand 1,500 are from inspectors, too.

Mr. HUGHES. Yes. I thought it was 700 and some inspectors.

Mr. SCHAFFER. Seven hundred and fifty to eight hundred inspectors.

Mr. HUGHES. Yes, inspectors were cut but, you know——

Mr. SCHAFFER. Mail handlers are not inspectors.

Mr. HUGHES [continuing]. You may move them from one area to another, from one mission to another, but some mission gets neglected. What you are doing is labor-intensive. I don't know how in the world, you know, given the additional smuggling that is taking place—drug smuggling, in particular—your mission is dealing with pornography and a whole host of other areas that Customs deals with, you could absorb a cut of 2,000 people.

Mr. SCHAFFER. Mr. Chairman, we are moving in a lot of different ways, as you know, in trying to respond to the drug threat. In addition to that, in terms of movement of regular commercial cargo, our approach is to be more selective in terms of our response and to use automation more and more.

So I think by using state-of-the-art technology and utilizing different management techniques, we are able to make some of the changes that we talked about in terms of absorbing those kinds of reductions. As well as that we are talking about eliminating a lot of overhead and redundant positions that we believe are, frankly, unnecessary, and should have been removed a long time ago.

Mr. HUGHES. Well, I mean, that will help. Obviously, we have got to continue to strengthen our procedures; use automation where that is possible; develop coordination, coordinating councils, better cooperation among the law enforcement agencies. All of that is going to help.

But, hey, look, let's face it. We have been operating in the margin for years. If we are serious about this business of doing something about the pornographers and about the smugglers, we have got to commit resources. That is why the South Florida Task Force operation was so successful. We committed resources. We got serious about it.

Mr. SCHAFFER. Absolutely.

Mr. HUGHES. We can't say it was automation that did that. I mean, coordination helped but we also committed resources but we took them from New York, and New Jersey, and Michigan. We just bled the country of resources and we shifted everything to the south, and we made a difference.

You can't cut 2,000. First of all, when you are operating on a margin to begin with, in effect, efficiencies through administrative procedures, they really get the ball over the goal line. That is what we are talking about.

I am happy you didn't say to us, we have got to do more with less.

Mr. SCHAFFER. I left some of those statements home.

Mr. HUGHES. Even the Attorney General doesn't say that anymore.

Mr. SAWYER. Would the gentleman yield?

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. What areas are you deemphasizing? You obviously have to deemphasize some if you are going to shift resources.

Mr. SCHAFFER. As a matter of fact, Congressman, I don't believe we are deemphasizing anything except what we consider to be unnecessary.

Mr. SAWYER. What do you consider to be unnecessary?

Mr. SCHAFFER. Overhead administrative positions that we have found through the course of time have been layered throughout the organization. And also what we would call routine examinations of repetitive shipments of merchandise that come into the country that can be handled in a different manner and a different approach than we have been handling them traditionally.

Mr. SAWYER. As I understand it, some 750 are your actual inspector positions. Those aren't overhead or administrative.

Mr. SCHAFFER. That's correct.

Mr. SAWYER. Then what are you loosening up on your inspection of? What areas?

Mr. SCHAFFER. The areas, as I say, routine commercial shipments, repetitive shipments that will be coming into the country that we have seen before, that we have examined before; those containers that again contain merchandise from countries that we have seen on a repetitive basis—we will be moving those into the country and allowing them to be released much quicker.

Mr. HUGHES. Would the gentleman yield?

Mr. SAWYER. Yes.

Mr. SCHAFFER. The question is whether or not contraband would be contained in those—again, we use intelligence information furnished by DEA.

Mr. HUGHES. You would have missed that 1,000 pounds of cocaine we just found in some roses that came into the country.

Mr. SCHAFFER. That is an excellent illustration of why and how we are working better, Mr. Chairman. What we did there is a new technique in terms of our own examination procedures. We were able, because of a new technique that we are now employing, to make that seizure. Had we not been changing the way we do business, changing our response, we would have missed that 1,000 pounds instead we made that seizure.

Mr. HUGHES. Sure, but——

Mr. SCHAFFER. So we could have had 5,000 people down there to perform their job and not utilize those new techniques and missed that 1,000 pounds.

Mr. HUGHES. True. You need both. You can't be spot-checking even with new procedures and pick up all this stuff that is coming into the country. I mean, it is coming in in barrels from South America: coke, and marijuana, and——

Mr. SMITH. Bales.

Mr. HUGHES. Whatever it is coming in as.

In any event the smugglers, have pretty good intelligence and they have got their own techniques. You have got to give them their due, they are working at it overtime. There is so much money involved. We just have to be one step ahead of them. We can't do that without resources. We can get the best computers, and the

best techniques, and the best strategy, but there is no substitute for personnel.

Mr. SAWYER. Will the gentleman yield?

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. What are the source countries of this child pornography, do you know?

Mr. SCHAFFER. The countries that we are targeting are Sweden, Denmark, and The Netherlands, primarily.

Mr. SAWYER. The Netherlands, too?

The family of my counsel, Ms. Vanlier here, is from The Netherlands. [Laughter.]

Mr. SCHAFFER. Had I known that, I would have deleted The Netherlands from my statement, I apologize.

Mr. HUGHES. We think Customs does a good job. We are not in any event trying to reflect on the excellent work that Customs does. We just think it is important for Customs to have the resources they need and we respect the good soldiers who come up here to tell the story.

But we have been involved too long in law enforcement not to recognize that there is no substitute for adequate funding, and good law enforcement doesn't come cheap, it is expensive. We haven't begun to commit the resources that we need to it.

Thank you very much, Mr. Schaffer.

Mr. SCHAFFER. Thank you.

Mr. HUGHES. That concludes the testimony for today. The subcommittee stands adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]

ADDITIONAL COPY

AMERICAN FAMILY ASSOCIATION
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WASHINGTON D.C. 20002
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STATEMENT OF THE AMERICAN FAMILY ASSOCIATION BY DAVID A. WILLIAMS; VICE PRESIDENT-EXECUTIVE DIRECTOR FOR PRESENTATION FOR THE RECORD OF THE HEARING HELD BY THE SUBCOMMITTEE ON CRIME OF THE HOUSE JUDICIARY COMMITTEE, REPRESENTATIVE WILLIAM HUGHES. D-2nd DIST.-N.J. PRESIDING: ROOM 2226 RAYBURN BUILDING, WASHINGTON, D.C. MAY 19, 1983 9:30 A.M.

It is most unfortunate that a hearing on child pornography legislation is being held---unfortunate in the sense that the use of children in pornography has expanded so much in recent years that legislation(federal, state, and local) has to be considered. The fact that "kiddie-porn" has become a growth industry in America is to the shame of our citizenry, law enforcement officials, and legislators alike. As the sexual exploitation of children sweeps across the length and breadth of this country it falls to the United States Congress to fashion a solution to the problem within the realm of it's jurisdiction. However, if the net result of these hearings is the passage of a law without an understanding of the forces and intellectual currents that have produced this horrid practice, then we are wasting our time. We believe that the sexual exploitation of children is the logical result of an attitude that regards certain forms of human life to be expendable. The words of philosopher-theologian Francis A. Schaeffer and United States Surgeon General C. Everett Koop, M.D. ring with crystal clarity on this point. "We believe that the increased use of children in sex films has been responsible for much of the sexual abuse of children. When absolute sexual standards are replaced by relativistic ones, and this is coupled with the generally low view of people that modern humanists have been teaching, society is not left with many barriers against the sexual abuse of children. After you remove the psychological and moral barriers imposed by a high and sacred view of human life, child

abuse of all kinds becomes very easy, given the stresses of child rearing, especially child rearing in the antifamily climate of today. The Supreme Court ruling that legalized abortion and the arbitrariness of that decision regarding who is or is not a "person" have broken down barriers. There has been a dramatic rise of crimes against children since abortion-on-demand became legal in the United States. We are convinced that this increase is caused in part by the liberalization of abortion laws and the resultant drastic lowering of the value placed on human life in general and on children's lives in particular." (Francis A. Scheffer and C. Everett Koop, M.D., Whatever Happened to the Human Race? [Fleming H. Revell Company. Old Tapper New Jersy. 1979], p. 31.)

In a sidenote, mothers who have had several abortions are more likely than others to beat their children, according to a study conducted by Dr. Burton G. Schoenfeld, a child psychiatrist of Prince Georges County General Hospital in Maryland.

We do not wish to belabor the point regarding the de-humanization of children, but before we move on to the subject of legislative remedies regarding child pornography, the attitudes of a number of distinguished scientists on the subject of the protection of children should not be ignored.

In May, 1973, James D. Watson, the Nobel Prize laureate who discovered the double helix of DNA, granted an interview to Prism magazine, then publication of the American Medical Association. Time later reported the interview to the general public, quoting Watson as having said, "If a child were not declared alive until three days after birth, then all parents could be allowed the choice only a few are given under the present system. The doctor could allow the child to die if the parents so choose and save a lot of misery and suffering. I believe this view is the only rational, compassionate attitude to have."

In January 1978, Francis Crick, also a Nobel laureate, was quoted in the Pacific News Service as saying, "...no newborn

infant should be declared human until it has passed certain tests regarding it's genetic endowment and that if it fails these tests it forfeits the right to live."

In Ideals of Life, Millard S. Everett, who was professor of philosophy and humananties at Oklahoma A&M, writes, "My personal feeling---and I don't ask anyone to agree with me--- is that eventually, when public opinion is prepared for it, no child should be admitted into the society of the living who would be certain to suffer any social handicap---for example, any physical or mental defect that would prevent marriage or would make others tolerate his company only from the sense of mercey." He adds, "This would imply not only eugenic sterilization but also euthanasia due to accidents of birth which cannot be foreseen." (The quotes from the three aforementioned scholars are taken from Schaeffer and Koop, Ibid, p.73.)

If one believes that Ideas have Consequences (and surely the effect of Mein Kampf bears this out) then it is extremely important that legislative steps be taken now to halt and wipe out child pornography, which is a logical manifestation of the philosophy expressed by Messrs. Watson, Crick, and Everett. Unless a tough, no-nonsense law is passed, the sexual abuse of children will continue to grow unabaited. We hate to imagine where that will ultimately lead to.

During the course of your hearings you will be receiving testimony from the Justice Department, Treasury, the Post Office, various law enforcement personnel, and representatives from the medical and health communities. They will be offering, from their perspectives, information that will be helpful in your deliberations. We of the American Family Association focus our concern on the child participant in the pornography. This is not to say that there are not others effected such as the reader of the pornography whose sexual values and actions become warped and twisted by it. Then there are those innocents who become the prey of the consumer of the pornography. Finally our society

becomes a victim by the eroding away of it's sexual standards by the pornography that it tolerates.

Yet as we have stated earlier our first concern is with the child forced to perform sexual acts. Any legislation that is passed with regards to child pornography must as its first consideration be the welfare of the child. This is not just our opinion but that of the U.S. Supreme Court's. We of course refer to it's decision on July 2, 1982 in the case of New York v. Ferber in which it upheld a New York State law prohibiting the depiction of sex acts involving children. The Court found that "it is evident beyond the need for elaboration that a state's interest in 'safeguarding' the physical and psychological well being of a minor is 'compelling'. Globe Newspapers v. Superior Court, U.S. (1982)." p.9.

Furthermore, "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." "The legislative judgement as well as the judgement found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child." p.10.

With these guidelines, we have studied very carefully the bills presented before the House and the Senate regarding this subject matter. Since we agree wholeheartedly with the Supreme Court's decision on New York v. Ferber, we would approve of legislation that attempts to incorporate that decision into federal law. On the Senate side, the bill that attempts this is S.1240, the "Child Protection Act of 1983", introduced by Senator Charles Grassley-R-Iowa. On the House side we recommend H.R. 2106, the Child Protection Act of 1983", introduced by Representative Charles Pashayan R-17 Cal.

Both bills would bring Federal statutes into conformity with the U.S. Supreme Court decision, New York v. Ferber. There is another bill, S.57 introduced by Senator Arlen Spector R-Pa.,

which although it attempts to tighten the Federal Code on child pornography, leaves exceptions that we find unacceptable. We refer to p.2 [2251.] Definitions for chapter under "(c) sado-masochistic abuse (for the purpose of sexual stimulation)", and p. 3, "(d) masturbation, except as included as an integral portion of a work possessing serious scientific or educational value; or", and p.3, "(6)'lewd exhibition' means that to the average person the depiction is patently offensive and lascivious without serious scientific educational or social value."

The sexual exploitation of a child damages him or her whether or not it appears in a sleazy magazine or film, or in a book on sex education. We refer again to the opinion of the U.S. Supreme Court in New York v. Ferber. "...Whether a work, taken as a whole, appeals to the purient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." p.13. "In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the child [who has been abused] whether or not the material....has literary, artistic, political, or social value.' Meomorandum of Assemblyman Lasher in Support of 263.15 We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem." pp.13-14.

For these reasons we believe that S. 57 or any other variant of it, either on the House or Senate side, cannot adequately and comprehensively affect a solution to the problem of the sexual exploitation of children.

Because H.R. 2106 and S.1240 incorporate the United States Supreme Court decision, New York v. Ferber into Federal statutes, we urge their passage.

We conclude by offering the information and expertise that we have developed on the child pornography problem, to the

relevant House and Senate Committees that have jurisdiction on this subject.

Thank you very much.

-30-

David A. Williams

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May 19, 1983

CHILD PORNOGRAPHY: A STUDY OF THE SOCIALSEXUAL ABUSE OF CHILDREN

EXECUTIVE SUMMARY

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Funding for this study was provided by the National Center on Child Abuse and Neglect - Grant #90-CA-811

THE CHILD VICTIMS OF PORNOGRAPHY

For the past two years, the Washington School of Psychiatry, through its subdivisions, the Special Projects Division and the Metropolitan Mental Health Skills Center, has been interviewing children on the streets of Washington, D.C., Baltimore, Maryland, and New York City who can be considered to be at risk of sexual exploitation. The purpose of the interviewing has been twofold: to determine, as far as possible, the extent to which such children, involved in prostitution and sex-related activities for commercial purposes, have either been involved in, or have been invited to be involved in, pornography, and to attempt to develop a psychosocial profile of such children.

Using field initiated research, the project has interviewed close to 750 individuals - largely children at risk, child prostitutes and child pornography victims, but also parents, pimps and customers. The technique that has been used to initiate the research has been simple. In most cases, initial contact has been established by stationing an investigator in a bus station restaurant, on a street corner on one of the "strips" or "strolls" in Washington, New York or Baltimore, and allowing youthful purveyors of commercial sexual activity to approach the investigator. After some initial conversation, which is usually an exploratory probe on the part of the youngster, the investigator explains to the youngster the purpose of his presence, the interview activity, and the study itself. The latter explanation was expressed, generally, in the following way: "This study is to help to find out how people who make their living around the bus station and on the stroll, make decisions about how they will live their lives." Upon further inquiry, the youngster would be told quite directly that the interviews had to do with the relationship of pornography to the rest of their lives.

The study also used contacts with pimps set up by police officials and police informers, and contacts with children set up in turn by these pimps. The extensive contacts with career criminals, prostitutes and pimps from other research and service programs conducted by the Washington School of Psychiatry's Metropolitan Mental Health Skills Center, also produced entree into the underworld and street life in order to establish contact with children on the street.

A significant number of retrospective interviews were done with young adults

who are in their very late teens or early and middle twenties in order to get a picture at a later date of the lives of people who had started as child prostitutes and pornography participants.

Originally, it was hoped that the development of a psychosocial profile of these children would provide some clues as to possible early prevention and early intervention strategies for working with these youth and their families.

The study attempted to investigate whether it is true that the at-risk population of children forms a kind of nest of concentric circles, the largest being all those children at risk of being victimized by sexual abuse or harassment - in the family and in the home, the next largest being children actually victimized, the next being child prostitutes, and the final innermost circle being children victimized in particular, unique or unusual ways - particularly through child pornography.

The study also surveyed a large sample of organizations and groups serving at risk children and youth - runaway houses, child protective agencies, etc., in order to see what their experience had been in serving child pornography victims. A mail survey was sent to 200 agencies and organizations, with a return of 35%, a typical level of response for mail questionnaires.

These surveys indicated that youth and child serving agencies believe that child pornography is a serious problem in their communities, but have not developed any methods for interviewing their constituencies about this problem, and in general do not feel that they are very thorough in interviewing children about sexual issues.

To date the findings of the study suggest:

+ Child pornography unlike child prostitution, which appears to be a large industry, as an "industry" in the United States is probably very limited. That is, there does not seem to be a large slick commercial production of child pornography.
+ There does exist a "cottage industry" for child pornography - children acknowledge that they are invariably asked to pose for personal pornographic photos by customers on the street and in bars and restaurants and hotels. They also acknowledge observing the exchange of pornographic snapshots in which their

peers are exhibited. Most children are unwilling to admit that they actively engage in such activities, although they universally point the finger at each other. Customers apparently do exchange these photos much like trading baseball cards, etc. There is also a significant amount of home movies and home video, which are also exchanged.

+ The youngsters involved in child pornography on the levels described above, fit the general description of runaway/child prostitutes:

1) The largest group are children who have been pushed out rather than runaway. They have been told directly, or by family behavior, that there is no more room for them in their homes - either for economic reasons, or for reasons of age specific family dynamics, or because of resistence to intra family sexual exploitation, or because of severe family trauma.

2) More than seventy-five percent report sexual abuse within the family.

3) An overwhelming percentage report a feeling of alienation from family lifestyle, family disciplinary culture, etc., from a very early age.

4) More than sixty percent report previous contact with mental health, social services, or other institutional helping professions. These have been perceived as actively hostile to the child, as instruments of increasing the alienation from family, and of intensifying a punitive familial attitude or policy toward the child. They are, accordingly, intensely distrusted, and perceived not as resources for help, but as reiterations of bad early family and institutional experiences.

+ The study suggests that the incidence of serious and chronic mental illness among the children and young people who engage both in prostitution and in pornography is very high. Many are the "deinstitutionalized" among the youthful mental hospital population, and not a few are individuals whose chronic mental illnesses have evidently never been treated during their lives, due to family

alienation from access to conventional mental health systems. It is also evident that a significant number of young people have had situational mental health crises due to severely traumatic family catastrophes - catastrophic deaths, suicides, murders, etc. for which they have received no emergency or crisis intervention support, and from the residual effects of which they continue to suffer.

+ The matching characteristics of this population with the most severely alienated runaway population do not adequately convey to the casual observer another important factor: these youngsters appear to share more directly characteristics with the adult homeless population. These children who are more pushed out than runaway, appear to be the "undocumented aliens" of the general population - and will be the homeless adults of the future. Their distrust of system resources, their pronounced isolation, and their vulnerability for exploitation and misuse is so severe that the likelihood of their being generally "reabsorbed" into the mainstream of American youth culture - or general culture seems minimal.

U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

15 June 1983

MEMORANDUM

TO: Honorable Harold S. Sawyer
Honorable E. Clay Shaw
Honorable F. James Sensenbrenner, Jr.

FROM: Charlene L. Vanlier
Minority Counsel
Subcommittee on Crime

RE: June 16 Hearing on Federal Child Pornography Legislation and Hearings

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The Subcommittee on Crime has scheduled a hearing on child pornography on June 16, 1983 at 9:30 A.M. in Room B-352 of the Rayburn House Office Building. Attachment A to this memorandum is a witness list.

1. Current Law

In 1977, the 95th Congress enacted P.L. 95-225, the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. Sections 2251-2253, 2423). This law has four components, which make it unlawful to (1) knowingly use or cause any minor to engage in or assist in any sexual act for the purpose of producing any film, photography or other visual medium; (2) permit a minor to engage in sexually explicit conduct, if one is the parent, guardian, or other person exercising control over the minor (both 18 U.S.C. § 2251); (3) transport in or receive from interstate transportation or the mail system material depicting such conduct by a minor (18 U.S.C. § 2252); and (4) transport a minor across state lines with the intent that such minor engage in prostitution or other prohibited conduct, with the knowledge that such conduct will be commercially exploited (18 U.S.C. § 2423). The law defines the terms "minor" (any person under the age of sixteen years), "sexually explicit conduct," "producing and "visual or print medium," for the purposes of 18 U.S.C. § 2251 and 2252. Under 18 U.S.C. § 2423, "minor" is defined as a person under the age of eighteen years.

Penalities for violating 18 U.S.C. § 2251 and 2252 are a fine of not more than $10,000 and/or imprisonment for not more than 10 years, for a first violation; and a fine of $15,000 and/or imprisonment for not less than two nor more than 15 years, for subsequent violations. The penalty for violating 18 U.S.C. § 2423 is a fine of not more than $10,000 and/or imprisonment for not longer than 19 years.

II. Impetus for Change

The existing federal law has been criticized for two reasons. First, the law requires a commercial distribution of child pornography, when much of the material is distributed in a non-commercial fashion.

Secondly, the federal law requires a showing that the distributed material be obscene. This obscenity requirement is based on the 1973 Supreme Court case, Miller v. California, 413 U.S. 15 (1973) in which the Court required a showing of obscenity before first amendment protections could be set aside. Fifteen states, like the federal government, required a finding of obscenity in their distribution offenses.

Twenty states, however, have passed distribution prohibitions that do not require a showing of obscenity. New York is one such state, and its child pornography statute was upheld by the Supreme Court on July 2, 1982. In New York v. Ferber, U. S. (1982), the Court found that the child pornography prohibited by the New York statute bears so heavily and persuasively on the welfare of children engaged in its production, that the state was entitled to a greater leeway in regulating child pornography. On balance, this state interest overrides first amendment protection. The court recognized, however, that some materials depicting minors, such as sex education aids or documentaries, would be entitled to first amendment protection even though they fall within the preview of the New York statute. Rather than rule the statute as unconstitutional on its face, the court reserved these issues for future case-by-case analysis. See Attachment B, which is the November 1982 Harvard Law Review analysis of the Ferber decision.

III. Legislative Proposals

Four bills addressing the child pornography question of commercial sale and obscenity have been introduced. These bills include, H. R. 2106, H.R. 2432, Title XV, part B of H. R. 2151, the President's Comprehensive Crime Control Act of 1983, H.R. 3062, introduced by Congressman Sawyer. The Sawyer bill is the President's version with two modifications. First, the existing fines are increased, and second, simulations are excluded from coverage if they occur in works with literary, artistic, scientific, social, or educational value.

The Subcommittee must address the following issues in its reform of the existing child pornography laws.

1. The bills unanimously eliminate a commercial requirement, since much of the child pornography is traded or shared without pecuniary benefit. The elimination of the requirement that the distribution be for commercial purposes is supported by the Justice Department.